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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-403

SAMUEL J. JORDON, et al.,

Petitioners

v.

JOHN J. GILLIGAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 6

CONCLUSION 20

APPENDIX—

District Court Order Granting Applications for Attorneys' Fees and Expenses 1a

District Court Order Directing That Plaintiff's Attorneys' Fees and Expenses Be Taxed as Costs 2a

Opinion and Order Denying Defendants' Motion for Stay of Execution and Vacating Attachment 3a

Opinion and Order Denying Defendants' Rule 60(b) Motion 8a

Opinion of United States Court of Appeals April 25, 1974 ..... 10a

Opinion of United States Court of Appeals July 18, 1974 ..... 21a

TABLE OF AUTHORITIES

Cases: PAGE

Avco Corp. v. Aero Lodge, 390 U.S. 557 (1968) 9

Beens v. Erdahl, (D. Minn., No. 4-71-Civ. 151) 9
Bradley v. School Board of the City of Richmond, 40 L. Ed. 2d 476 (1974) 14
Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) 8, 11

Clark v. Barnard, 108 U.S. 436 (1883) 17
Chicago, etc. R.R. Co. v. United Transportation Union, 402 U.S. 570 (1971) 16
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 16
Class v. Norton, 376 F. Supp. 496 (D. Conn. 1974) 9

Dick Press Guard Mfg. Co. v. Bowen, 229 F.193, 196 (N.D.N.Y. 1915) *aff'd* 229 F.575 (2d Cir. 1915), *cert. denied* 241 U.S. 671 (1915) 17
Dillenberger v. Florida Probation and Parole Commission, Civ. No. 73-66 (N.D. Fla.) 14

Eagle Mfg. Co. v. Miller, 41 F. 351 (S.D. Iowa 1890) 18
Edelman v. Jordan, 39 L. Ed. 2d 662 (1974) 7, 8, 12, 13, 15, 19
Ex Parte Young, 209 U.S. 123 (1908) 6, 7, 9, 10, 12, 15, 16

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) 6, 11, 12, 16, 18, 19
First National Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973) 15

Gates v. Collier, 489 F.2d 298 (5th Cir. 1973) 8, 9, 11, 19
General Oil v. Crain, 209 U.S. 211 (1908) 13
Grabam v. Marshall, Civ. No. T-73-77 (N.D. Fla.) 14

PAGE

Hall v. Cole, 412 U.S. 1 (1973) 15
Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) 8

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 7, 9, 11, 12
Jurisdictional Statement, No. 72-12, October Term, 1972 9

Kerns v. Jordon, *cert. den.* 42 U.S.L.W. 3468 (1974) 4
Kirkland v. New York State Dept. of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974) 9, 11

LaRaza Unida v. Volpe, 488 F.2d 559 (9th Cir. 1973) 8, 9, 12
Liberles v. Daniel, No. 73-C-3217 (N.D. Ill.) 14

Manning v. Gilligan, No. 73-453, appeal dismissed 42 U.S.L.W. 3332 (1973) 4
Milburn v. Huecker, (6th Cir. Nos. 73-1259 and 73-1430) (August 5, 1974) 8, 11
Mills v. Electric Auto-Life Company, 376 U.S. 375 (1970) 6
Missouri v. Fiske, 290 U.S. 18 (1933) 17
Mitchum v. Foster, 407 U.S. 225 (1972) 16
Monroe v. Pape, 365 U.S. 167 (1961) 18

N.A.A.C.P. v. Allen, 340 F.Supp. 703 (M.D. Ala. 1972) 9
Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974) 8
Natural Resources Defense Council v. Environmental Protection Administration, 484 F.2d 1331 (1st Cir. 1973) 8
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 6, 15

PAGE

Newman v. State of Alabama, 349 F.Supp. 278 (M.D. Ala. 1972) 9

Norris v. Jordan, No. 71-1109 and No. 71-1439, *appeal dismissed* 409 U.S. 811 (1972), *rehearing den.* 409 U.S. 1029 4

Norwood v. Harrison, No. WC 70-53-K (N.D. Miss.) 14

Ocean Accident & Guarantee Corp. v. Felgemaker, 143 F.2d 950 (6th Cir. 1944) 17, 18

Pegues v. Mississippi State Employment Services, No. 72-4-S (N.D. Miss.) 14

Pyramid Lake Piute Tribe v. Morton, No. 74-342 6

Scheuer v. Rhodes, 40 L.Ed. 2d 90 (1974) 7

Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972), aff'd 409 U.S. 942 (1972) 9, 10, 11, 19

Sinrock v. Obara, 320 F.Supp. 1098 (D. Del. 1970) 9, 12

Skehan v. Board of Trustees of Bloomsburg State College, (3d Cir., No. 73-1613) (May 3, 1974) 8, 9, 11, 13

Souffront v. Compagnie des Suceries, 217 U.S. 475 (1910) 17

Souza v. Travisono (No. 5261, D.R.I.) 9

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 16

Stolberg v. Members of the Board of Trustees for State College of Connecticut, 474 F.2d 485 (2d Cir. 1973) 7, 8

Taylor v. Perini, 359 F.Supp. 1185 (N.D. Ohio 1973) 5, 9, 10

Utah v. United States, 304 F.2d 23 (10th Cir. 1962) *cert. denied* 371 U.S. 828 11

Vanguard Justice Society v. Mandel, No. 74-71-K (D. Md.) 14

PAGE

Virginia Coupon Cases, 114 U.S. 269 (1885) 16

Wainwright v. State of Florida Department of Transportation, Civ. No. 73-42 (N.D. Fla.) 14
Welch v. Rhodes, (S.D. Ohio, No. 69-249) vacated 492 F.2d 1244 (6th Cir. 1974) 9
Wyatt v. Stickney, 344 F.Supp. 373 (M.D. Ala. 1972) 9

Statutes:

7 U.S.C. §2305 16
12 U.S.C. §1975 16
15 U.S.C. §15 16
15 U.S.C. §72 16
15 U.S.C. §78(a) 16
15 U.S.C. §298(b) 16
15 U.S.C. §1640 16
20 U.S.C. §1617 16
28 U.S.C. §1254(1) 2
28 U.S.C. §1920(1) 19
28 U.S.C. §1920(2) 19
28 U.S.C. §2281 4
33 U.S.C. §1365(d) 16
42 U.S.C. §1983 2
42 U.S.C. §2000a-3(a) 16
42 U.S.C. §2000e-5(g) 16
42 U.S.C. §3612(c) 16

PAGE

49 U.S.C. §8 16

49 U.S.C. §16(2) 16

49 U.S.C. §908(e) 16

86 Stat. 103 13

Other Authorities:

6 Moore's Federal Practice ¶54.77[2] 15, 16

ten Broek, Equal Under Law (1965) 17

Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment", 1950 Wis. L. Rev. 479 17

Graham, "the 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938) 17

Brief Amicus Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., in *Edelman* v. *Jordan* No. 72-410 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Samuel Jordon et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 18, 1974.

Opinions Below

The opinion of the Court of Appeals of July 18, 1974, is not yet reported, and is set out in the Appendix hereto, pp. 21a-35a. The opinion of the Court of Appeals of April 25, 1974, is not yet reported, and is set out in the Appendix hereto, pp. 10a-20a. The opinion of the District Court of June 12, 1973 is not reported, and is set out in the Appendix hereto, pp. 8a-9a. The opinion of the District Court of March 9, 1973, is not reported, and is set out in the Appendix hereto, pp. 3a-7a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Does the Eleventh Amendment prohibit the award of costs, including attorneys' fees, against a state or its employees in their official capacities, in litigation to enforce the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 1983, 42 U.S.C., provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

Petitioner Samuel Jordon commenced this class action in November, 1971, to challenge the constitutionality of a plan reapportioning the Ohio legislature. The complaint named as defendants several state officials in their official capacities, including the Governor and the members of the Ohio Apportionment Board, a state body which had drawn the new district lines. Petitioner claimed that the district lines in question violated the Fourteenth and Fifteenth Amendments in that (1) there were impermissibly great differences in the size of the districts (2) the voters in certain portions of the state were disenfranchised because they were not included in any district at all, and (3) the districts had been racially gerrymandered to minimize the voting strength of minority voters.

Since the action involved the constitutionality of a statute of statewide application, a three judge court was duly convened. 28 U.S.C. §2281. After a hearing on the merits the District Court on December 3, 1971, ruled the reapportionment plan unconstitutional because of the disparate size of the districts and because certain areas were not included in any House or Senate District. The District Court was thus not required to decide whether the plan was also invalid as an attempt to discriminate on the basis of race. The defendants took no appeal from this decision, and on March 13, 1972, a new redistricting plan submitted by the defendants was approved by the District Court. Several intervenors sought without success to overturn the District Court's decision on the merits. See *Norris* v. *Jordon,* Nos. 71-1109, 71-1439, *appeal dismissed* 409 U.S. 811 (1972), *rehearing den.* 409 U.S. 1029; *Manning* v. *Gilligan,* No. 73-453, *appeal dismissed* 42 U.S.L.W. 3332 (1973); *Kerns v. Jordon, cert. den.* 42 U.S.L.W. 3468 (1974).

On April 19, 1972, petitioner moved for an award of counsel fees and expenses. The defendants did not oppose the request, and the matter was referred to the original District Court judge, a decision by the full panel not being required on such a question. On May 19, 1972, Chief Judge Battisti approved the request and ordered that counsel fees and expenses totaling $27,272.65 be paid by "the State of Ohio, through" the named defendants "collectively, in their official capacities, as the persons responsible for apportioning the State of Ohio." P. 1a. No appeal was taken from this decision.

Eight months passed and the judgment remained unpaid. On January 17, 1973, the District Court issued a new order directing that "costs, including Plaintiff's attorneys' fees and expenses as previously ordered paid in

the amount of $27,272.65, shall be taxed as costs against the State of Ohio" P. 2a. No appeal was taken from this decision. Thereafter plaintiff filed a praecipes for a writ of fieri facias against a bank account maintained by the State of Ohio, and the District Court directed the bank to pay the contested monies to the clerk of the court.

On February 22, 1973, nine months after the original award of counsel fees and 36 days after the January 17, 1973, order, the defendants and the State of Ohio moved under Rule 60, Federal Rules of Civil Procedure, to vacate the admittedly final orders of May 19, 1972, and January 17, 1973, on the ground that those orders were in excess of the District Court's jurisdiction.[1] Shortly thereafter, but before the writ was enforced, the State paid the $27,272.65 and the District Court vacated the attachment of the State's bank account. On June 12, 1973, the District Court denied defendants' motion and reaffirmed its decisions of May, 1972 and January, 1973. Pp. 8a-9a.

On appeal the Sixth Circuit reversed. Pp. 10a-35a. The Court of Appeals held that the Eleventh Amendment precludes an award of counsel fees or expenses against a state or against state officials acting in their official capacities. Pp. 26a-33a. The Sixth Circuit also concluded

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[1] A similar pattern occurred in two other federal cases in Ohio. In *Taylor* v. *Perini*, 359 F. Supp. 1185 (N.D. Ohio 1973), counsel fees were ordered, apparently without opposition, on September 12, 1972. On February 26, 1973, shortly after the Rule 60 motion in this case, the Attorney General's office advised the District Court the state would not pay any fees, and shortly thereafter moved to set aside the award of fees under Rule 60. In *Welch* v. *Rhodes* (No. 69-249, S.D. Ohio), the District Court awarded counsel fees against the state, Ohio having contested the amount of the fee but not liability. On February 22, 1973 Ohio unsuccessfully moved to set aside the award under Rule 60. *Taylor* is now pending on appeal in the Sixth Circuit; *Welch* was vacated and remanded for clarification of the district court's order. 494 F.2d 1244 (6th Cir. 1974).

that the two final orders of the District Court were not res judicata, and could be collaterally attacked by a Rule 60(b) motion. The Court of Appeals issued its initial opinion on April 25, 1974. Pp. 10a-20a. Petitioner sought rehearing *en banc*. On July 18, 1974 the original panel issued a new opinion, pp. 21a-35a, and the petition for rehearing *en banc* was denied.

Reasons for Granting the Writ

The Eleventh Amendment became effective on January 8, 1798. Since February Term, 1810, the rules of this Court have provided that costs shall be taxed against the losing party in every cause. For at least a century the uniform practice of this Court has been to tax such costs even where the losing party is a State. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 77 (1927). Within the last decade the decisions of this Court, and a variety of new federal statutes, have increased the number of cases in which attorneys' fees may be assessed as part of costs. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968); *Mills* v. *Electric Auto-Life Company,* 376 U.S. 375 (1970). Within the last two years a score of decisions in the district courts and courts of appeals have considered whether, in litigation against state officials under *Ex parte Young,* 209 U.S. 123 (1908), the federal courts have the power to award costs, including counsel fees, to a successful plaintiff.[2] That question was raised by this Court at oral argument, but not decided, in *Edelman* v. *Jordan,* No. 72-1410, Transcript, p. 8.

In the instant case the District Court concluded it had such power. In attempting to enforce its award of costs,

[2] A similar question regarding whether attorneys' fees can be awarded against the federal government is raised by the Petition for Certiorari in *Pyramid Lake Piute Tribe* v. *Morton,* No. 74-342.

including counsel fees, the District Court entered two orders directing payment—one against the defendant state officials "in their official capacities," p. 1a, and one against the State of Ohio. P. 2a. Both orders contemplated payment out of state funds.[3] The Court of Appeals reversed, apparently reasoning, in the light of this Court's decision in *Edelman* v. *Jordan*, 39 L.Ed. 2d 662 (1974), that any monetary award to be paid out of the state treasury was precluded by the Eleventh Amendment. The opinion of the Sixth Circuit precludes such awards for either attorneys' fees or ordinarily taxable expenses of the litigation, regardless of whether the award is nominally against officials in their official capacities or against the state as such.[4]

Within the last year decisions in several other circuits have upheld awards of attorneys' fees against state agencies or state officers in their official capacities. In *Jordan* v. *Fusari*, 496 F. 2d 646, 651 (2d Cir. 1974), the Second Circuit held that an award of counsel fees "as part of an order granting injunctive relief, has at most the 'ancillary effect on the state treasury,' which *Edelman* v. *Jordan, supra*, 42 U.S.L.W. at 4424, characterizes as 'a permissible and often inevitable consequence of the principle announced in *Ex parte Young*,' 209 U.S. 123 (1908)." See also *Stolberg* v. *Members of the Board of Trustees for State College of*

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[3] The question of the liability of the state officials to satisfy such awards out of their personal funds was not considered by either the District Court or the Court of Appeals. See *Scheuer* v. *Rhodes*, 40 L.Ed. 2d 90 (1974).

[4] The sole reason given by the Court of Appeals for reversing the award of counsel fees and expenses, and the only argument advanced in the Sixth Circuit by appellants, was the prohibition of the Eleventh Amendment. Any other possible objection to that award is precluded by the failure of the appellants to file a timely appeal of the District Court decisions of May 19, 1972, and January 17, 1973. Only the jurisdictional objection founded on the Eleventh Amendment, if any, can be relied upon to attack a final judgment under Rule 60(b), Federal Rules of Civil Procedure.

Connecticut, 474 F.2d 485, 490, n.3 (2d Cir. 1973). In *Brandenburger* v. *Thompson*, 494 F.2d 885, 888 (9th Cir. 1974), the Ninth Circuit concluded that "an award of attorneys' fees assessed against a state official acting in his or her official capacity is not prescribed by the Eleventh Amendment." See also *LaRaza Unida* v. *Volpe*, 488 F.2d 559 (9th Cir. 1973), affirming 57 F.R.D. 94, 101-102, n.11. In *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), *rehearing en banc granted*, the Fifth Circuit reached the same conclusion.

> Although the trial court had the power to assess attorneys' fees and expenses against the individual defendants found to have engaged in the unconstitutional conduct, we think it does not vitiate the award because the trial court prescribed that this part of the cost were to be payable "from funds which the Mississippi Legislature, at its 1973 session, may appropriate for the operation of the Mississippi State Penitentiary" . . .

489 F.2d at 302. See also *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974); *Natural Resources Defense Council* v. *Environmental Protection Administration*, 484 F.2d 1331, 1333 (1st Cir. 1973) *Milburn* v. *Huecker*, (6th Cir., Nos. 73-1259 and 73-1430) (August 5, 1974, slip opinion, pp. 4-6). *Jordan, Hoitt* and *Milburn* were decided after *Edelman*. On the other hand the Third Circuit has concluded that the Eleventh Amendment does preclude any award of counsel fees, *Skehan* v. *Board of Trustees of Bloomsburg State College*, (3d Cir., No. 73-1613) (May 3, 1974 slip opinion, pp. 20-22), and a panel of the Fifth Circuit has recently declined to follow *Gates*. *Named Individual Members of San Antonio Conservation Society* v. *Texas Highway Dept.*, 496 F.2d 1017, 1025 (5th Cir. 1974), *rehearing en banc granted*. In the instant case the Sixth Circuit noted that "lower court decisions have not been unanimous," p. 30a, and stated "we respectfully decline to adopt

the position taken by the Fifth Circuit" in Gates. P. 30a.[5] Such a conflict among the circuits requires a grant of certiorari by this Court to establish a uniform rule. *Avco Corp.* v. *Aero Lodge,* 390 U.S. 557, 559 (1968).

The decision of the Sixth Circuit in this case is in square conflict with the decisions of at least 8 District Courts. In *Sims* v. *Amos,* 340 F. Supp. 691, 694 (M.D. Ala. 1972) (state reapportionment), *aff'd* 409 U.S. 942 (1972), the District Court, relying on *Ex parte Young,* 209 U.S. 123 (1908), awarded costs, including attorneys' fees, against "the Alabama State Legislature, the Governor, the Attorney General, and the Secretary of State." See also *Newman* v. *State of Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972), *N.A.A.C.P.* v. *Allen,* 340 F. Supp. 703, 710 (M.D. Ala. 1972) (employment discrimination); *Taylor* v. *Perini,* 359 F. Supp. 1185, 1186-87 (N.D. Ohio 1973) (award against state correction officials to be paid by state); *LaRaza Unida* v. *Volpe,* 57 F.R.D. 94, 102 (N.D. Cal. 1972) (environmental protection). *Kirkland* v. *New York State Dept. of Correctional Services,* 374 F. Supp. 1361, 1381-82 (S.D. N.Y. 1974) (employment discrimination). *Wyatt* v. *Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972) (conditions in mental hospitals); *Beens* v. *Erdahl,* (D. Minn., No. 4-71-Civ 151) (order dated December 14, 1972) (state reapportionment); *Class* v. *Norton,* 376 F. Supp. 496, 376 F. Supp. 503 (D. Conn. 1974); *Souza* v. *Travisono,* (D.R. J., No. 5261) (opinion dated July 8, 1974). *Welch* v. *Rhodes,* (S.D. Ohio, No. 69-249) (orders dated May 8, 1972 and May 23, 1973) vacated 492 F.2d 1244 (6th Cir. 1974). But see *Sincock* v. *Obara,* 320 F. Supp. 1098 (D. Del. 1970). *Kirkland, Class* and *Souza* were decided after *Edelman.*

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[5] Similarly the Third Circuit in *Skehan* expressly declined to follow *Gates,* slip opinion, p. 18, n. 7, or *Jordan* v. *Fusari,* Order of June 11, 1974, amending opinion of May 3, 1974.

The conflict among the lower courts exists largely because of uncertainty as to the significance of this Court's decision of October 24, 1972, affirming *Sims* v. *Amos, supra. Sims* had directed that an award of counsel fees be paid by the Governor and Legislature of the State of Alabama. In its Jurisdictional Statement, Alabama objected

> The award to the plaintiffs of their attorneys' fees and expenses incurred and . . . the taxing of these items as costs against the defendants who are elected state officials erred in their official capacity . . . was tantamount to the award of money judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity.

Jurisdictional Statement, No. 72-12, October Term, 1972, p. 17. Appellees contended that *Ex parte Young* 209 U.S. 123 (1908), permitted an award of costs, including counsel fees, against a state or its employees in their official capacities, and that the Eleventh Amendment did not apply to any award of costs even including counsel fees. Motion to Dismiss or Affirm, No. 72-12, October Term, 1972, pp. 9-12. This Court affirmed the award of counsel fees without opinion. 409 U.S. 942.

The lower courts awarding counsel fees against states since *Sims* have consistently relied on this Court's affirmance in that case. In *Taylor* v. *Perini,* 359 F. Supp. 1185, 1186, (N.D. Ohio 1973), the court explained regarding *Sims*:

> Counsel for the plaintiffs has also supplied this Court with the Jurisdictional Statement of the case which was filed in the United States Supreme Court by the Attorney General of Alabama. On page seventeen of this statement, the question of Alabama's sovereign immunity is clearly set forth. Although the Supreme Court affirmed the district court decision without

> opinion, it can logically be assumed that, in light of these two clear references to the Eleventh Amendment problem, the Supreme Court considered it in making its determination. This Court concludes, therefore, that the *Sims* case is controlling on this issue. . . .

See also *Gates* v. *Collier,* 489 F.2d 298, 302 (5th Cir. 1973) (quoting the Jurisdictional Statement); *Jordan* v. *Fusari,* 496 F.2d 646, 651 n.11 (2d Cir. 1974); *Milburn* v. *Huecker* (6th Cir., nos. 73-1259 and 73-1430) (August 5, 1974, slip opinion, p. 8); *Brandenburger* v. *Thompson,* 494 F.2d 885, 888 (9th Cir. 1974); *Kirkland* v. *New York State Dept. of Correctional Services,* 374 F.Supp. 1361, 1382 (S.D. N.Y. 1974). In the instant case the Sixth Circuit noted that *Sims* had been relied on by 5 other courts, but declined to follow it on the ground that summary affirmances were not "of the same precedential value" as a written opinion from this Court. Pp. 27a-29a. In *Skehan* v. *Board of Trustees of Bloomsburg State College* (3d Cir., No. 73-1613), the Third Circuit concluded that *Edelman* v. *Jordan* was intended to overrule the affirmance in *Sims,* and that this Court's failure to expressly overrule *Sims* was mere "inadvertence." (May 3, 1974, slip opinion p. 18, n. 7). Such uncertainty as to the significance and vitality of *Sims* can only be resolved by this Court.

A similar conflict exists as to the significance of this Court's decision in *Fairmont Creamery* v. *Minnesota,* 275 U.S. 70 (1927). *Fairmont Creamery* expressly held that a state's sovereign immunity did not protect it from an award of costs in federal court. See also *Utah* v. *United States,* 304 F.2d 2d (10th Cir. 1962) *cert. denied* 371 U.S. 828. In *Sims* v. *Amos* the appellee contended that the rule in *Fairmont Creamery* covered an award of counsel fees as part of costs. Motion to Dismiss or Affirm, No. 72-12, October Term, 1972, pp. 10-11. *Fairmont Creamery* was expressly relied upon by the Second Circuit in *Jordan* v.

Fusari and the District Court in *LaRaza Unida* v. *Volpe*. See No. 73-2364, 2d Cir., April 29, 1974, slip opinion, p. 3068 n. 11, 57 F.R.D. 94, 101-102, n. 11 (N.D. Cal. 1972). The Sixth Circuit, however, declined to follow *Fairmont Creamery* in this case on the ground that counsel fees are not "analogous" to costs, p. 33a and the district court in *Sincock* v. *Obara*, dismissed the "provocative language in the opinion" on the incorrect assumption that the award of costs in *Fairmont Creamery* had been against the United States. 320 F. Supp. 1098, 1104, n. 12.

The Court of Appeals also concluded that Eleventh Amendment restricts the power of the federal courts to enforce the Fourteenth Amendment. pp. 31a-33a. In *Ex parte Young*, 209 U.S. 123 (1908), this Court expressly left open the question of whether the Eleventh Amendment had been limited by the later enactment of the Fourteenth.[6] In *Edelman* v. *Jordan*, 39 L.Ed. 2d 662 (1974), two members of this Court concluded that question was still unresolved.[7] The Sixth Circuit, however, concluded that this Court in *Edelman* had decided, *sub silentio*, that the Eleventh Amendment limited the power of the federal courts to provide remedies for violations of the Fourteenth.

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[6] "We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment". 209 U.S. at 150.

[7] "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case." 39 L.Ed. 2d at 690, n.2; c.f. *Curtis* v. *Loether*, 415 U.S. 189, 198, n.15 (1974).

> Claims for money against a state can arise in three separate legal frameworks. . . . Third, it may be based on the Fourteenth amendment, which binds the states directly and under §5 of which Congress has the power to create remedies. . . . Justice Marshall is technically correct that *Edelman* does not dispose of the Third category. But the majority opinion expressly overrules *Shapiro* v. *Thompson*, supra; *State Department of Health and Rehabilitative Services* v. *Zarate*, supra, and *Wyman* v. *Bowens*, supra, all Fourteenth amendment cases. We think *Edelman* must be read as closing the door on any money award from a state treasury in any category.

Appendix, 32a-33a. The Third Circuit has also concluded that the Eleventh Amendment limits remedies under the Fourteenth. *Skehan* v. *Board of Trustees of Bloomsburg State College* (3d Cir., No. 73-1613) (May 3, 1974, slip opinion p. 18, n.7).

In *General Oil Company* v. *Crain*, 209 U.S. 211, 226-27 (1908), this Court recognized that if the Eleventh Amendment precluded the award of necessary and proper relief in cases under the Fourteenth Amendment, "the 14th Amendment, which is directed at state action, could be nullified as to much of its operation". The decision of the Sixth Circuit substantially restricts the power of Congress under section 5 of the Fourteenth Amendment to redress violations of that Amendment. In the wake of *Edelman*, *Skehan*, and the decision in this case, states have challenged the constitutionality of several important federal laws enacted under section 5. In 1972 Congress amended Title VII of the 1964 Civil Rights Act to create a cause of action against states which discriminate in employment on the basis of race. 86 Stat. 103, 42 U.S.C. §2000e(a). Because

the remedies available under Title VII include both counsel fees and back pay, the states of Florida, Mississippi, Maryland and Illinois have contended that Title VII is, in this respect, unconstitutional.[8] In Tennessee the Attorney General has ruled that Title VII violates the Eleventh Amendment, and that an employee who was discriminated against on the basis of race and sex could not be reimbursed for back wages "without a specific appropriation by the legislature." Expressly relying on the decision of the Sixth Circuit in this case, the ruling concluded

> *Jordon* v. *Gilligan*, . . . held the granting of attorney's fees against state governments to be barred by the Eleventh Amendment. The Courts have found this necessary to preserve the fiscal integrity of the states .... The Civil Rights Act is, therefore unconstitutional in as much as it may attempt to require the payment of back wages by State employees and the charging of attorney's fees against State government.[9]

The constitutionality of section 718 of the Emergency School Aid Act of 1972, which authorizes awards of counsel fees against a State or any agency thereof in certain school litigation, is now at issue in *Norwood* v. *Harrison*, No. WC 70-53-K (N.D. Miss.). See *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed. 2d 476 (1974). The power of Congress and the federal courts to enforce the Fourteenth

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[8] *Dillenberger* v. *Florida Probation and Parole Commission*, Civ. No. 73-66 (N.D. Fla.); *Wainwright* v. *State of Florida Department of Transportation*, Civ. No. 73-42 (N.D. Fla.); *Graham* v. *Marshall*, Civ. No. T-73-77 (N.D. Fla.); *Vanguard Justice Society* v. *Mandel*, No. 74-71-K (D. Md.); *Liberles* v. *Daniel*, No. 73-C-3217 (N.D. Ill.); *Pegues* v. *Mississippi State Employment Services*, No. 72-4-S (N.D. Miss.).

[9] Letter of Assistant Attorney General William B. Hubbard to Mr. Randy Griggs, Director, Tennessee Office of Economic Opportunity, July 18, 1974.

Amendment is a constitutional question of the first magnitude which only this Court can definitively decide, and a prompt resolution is necessary lest uncertainty as to the availability of a remedy delay the commencement or prosecution of private civil litigation to enforce Title VII or other prohibitions against state discrimination.

The decision of the Sixth Circuit clearly misconstrues this Court's decision in *Edelman* v. *Jordan*, 39 L.Ed.2d 662 (1974). *Edelman* did not forbid the award of any relief which had any financial impact on a state; it recognized the propriety of relief with an "ancillary effect on the state treasury" as "a permissible and often inevitable consequence of the principle announced in *Ex Parte Young*." 39 L.Ed.2d at 675. The awards precluded by the Eleventh Amendment are those "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials". 39 L.Ed.2d at 676. When counsel fees are available in the United States it is not as an element of damages needed to make whole the plaintiff. See 6 Moore's Federal Practice ¶ 54.77[2]. Counsel fees, unlike damages or retroactive welfare payments, are not provided as compensation violation of a substantive right, but for a variety of other reasons, such as (1) punishing a litigant for obdurately obstinate conduct and deterring such conduct in the future, *First National Bank* v. *Dunham*, 471 F.2d 712 (8th Cir. 1973) (2) sharing the cost of the litigation among those benefiting from it, *Hall* v. *Cole*, 412 U.S. 1 (1973), and (3) encouraging the prosecution by "private attorneys general" of litigation advancing important public policies. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Such an award is not analogous to the award at law of compensatory damages, the relief which the Eleventh Amendment was enacted to preclude, but is an incident of the inherent power of equity to render com-

plete justice in a case. Compare *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). The Amendment does not preclude an award of costs against a state, *Fairmont Creamery* v. *Minnesota*, 275 U.S. 70 (1927), and when attorneys fees are available it is as an element of costs. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); 6 Moore, Federal Practice ¶ 54.77.[10] An award of counsel fees, as any other award of costs, does not fall within the proscription of the Eleventh Amendment.

The Sixth Circuit was also in error in concluding that the Eleventh Amendment limited the remedies available to enforce the Fourteenth Amendment. Although those provisions can often be reconciled through the legal fiction of *Ex parte Young* 209 U.S. 123 (1908), when the two amendments are in conflict the more specific and recent provisions of the Fourteenth must prevail. See *The Virginia Coupon Cases*, 114 U.S. 269, 331 (1885); *Chicago, etc. R.R. Co.* v. *United Transportation Union*, 402 U.S. 570, 582 (1971). Sovereign immunity is merely a procedural protection for the sovereign powers of the states, *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J., dissenting), and that immunity has no application in areas where the Fourteenth Amendment has stripped the states of their sovereign power. See *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). That the Eleventh Amendment should be construed to limit remedies under the Fourteenth would be particularly inappropriate in view of the fact that the framers of the Fourteenth believed the rights described therein already existed by virtue of the privileges and im-

[10] Federal statutes expressly authorizing an award of counsel fees invariably do so by making them one of the recoverable costs. See e.g. 7 U.S.C. §2305; 12 U.S.C. §1975; 15 U.S.C. §§15, 72, 78(a), 298(b), 1640; 20 U.S.C. §1617; 33 U.S.C. §1365(d); 42 U.S.C. §§2000a-3(a), 2000e-5(g), 3612(c); 49 U.S.C. §§8, 16(2), 908(e).

munities clause and the Bill of Rights, and proposed the Amendment to assure that there would be a remedy to redress violations of those rights. See generally ten Broek, Equal Under Law (1965); Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment", 1950 Wis.L.Rev. 479; Graham, "the 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938); Brief Amicus Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., in *Edelman* v. *Jordan,* No. 72-410.

Under the circumstances of this case Ohio clearly waived any immunity from liability for costs and attorneys' fees. In an action such as this a state doubtless has a right to intervene in the litigation, participate in its conduct, and submit its legal claims to judicial determination. Had Ohio formally become a party, it would have waived its immunity under the Eleventh Amendment and become liable to judgment like any other litigant. *Clark* v. *Barnard,* 108 U.S. 436, 447-48 (1883); *Missouri* v. *Fiske,* 290 U.S. 18, 24 (1933). In the instant case Ohio, without formally becoming a party, sought and obtained all the benefits of that status in the District Court; it appeared through the state Attorney General, it assumed control of the defense, and it successfully opposed efforts by the nominal defendants to control that defense. A non-party who with such an interest in the outcome of litigation, even if the non-party would otherwise have been outside the jurisdiction of the district court, is bound by the outcome of the litigation, *Souffront* v. *Compagnie des Suceries,* 217 U.S. 475, 486-87 (1910); *Dick Press Guard Mfg. Co.* v. *Bowen,* 229 F.193, 196 (N.D. N.Y. 1915), aff'd 229 F.575 (2d Cir. 1915), *cert. denied* 241 U.S. 671 (1915). Such a nominal non-party is no stranger to the litigation, and judgment on the merits may be entered directly against him as well as against the formal parties. *Ocean Accident & Guarantee Corp.* v. *Felgemaker,* 143 F.2d

950, 952 (6th Cir. 1944); *Eagle Mfg. Co.* v. *Miller*, 41 F.351, 357 (S.D. Iowa 1890).

Neither the Eleventh Amendment nor *Monroe* v. *Pape*, 365 U.S. 167 (1961), give a state an absolute immunity from liability; they assure such immunity only so long as a state does not seek the benefits that would be its as a party. When a state official is sued for an alleged violation of federal law, the state may choose to remain at arms length from the litigation, leaving the official to prove his innocence of the charges. In such a case the state's immunity remains intact. But if the state elects to participate fully in the litigation, assuming the same control of the litigation it would have had as a named defendant, it must accept the ordinary consequences of such participation. In cases such as this for injunctive relief the named officials, if left to their own resources, would have little interest in the outcome of the litigation; it is only because of the participation of the state that substantial efforts by plaintiffs counsel are required. A state cannot, by such participation in civil rights litigation, precipitate extended litigation and require the expenditure of substantial time, effort and monies by plaintiffs and their counsel without becoming liable for the costs, including counsel fees, of such action if the defense is unsuccessful.

The Court of Appeals also overturned that portion of the District Court's opinion awarding costs for items other than counsel fees. The District Court order of May 19, 1972, granted as part of costs $1262.65 for various expenses of the litigation. Although the Sixth Circuit opinion deals primarily with the question of counsel fees, it reverses the award of these expenses as well as "void for lack of jurisdiction." pp. 23a, 35a. This Court, however, has of course held that a state's immunity does not protect it from an award of costs. *Fairmont Creamery Co.* v. *Minnesota*, 275

U.S. 70 (1927). Among the items awarded as expenses by the District Court were expenditures traditionally awarded as costs, including marshall fees, 28 U.S.C. § 1920(1) and stenographic charges, 28 U.S.C. § 1920(2). Insofar as the Sixth Circuit held that Ohio could not be required to pay these costs, its decision was clearly erroneous.

The substantiality of the question presented by this Petition is attested to by the position taken by the United States in an *amicus* brief in *Gates* v. *Collier* (5th Cir. No. 73-1790). The Department of Justice there urged at length that the Eleventh Amendment does not prohibit the award of counsel fees against a state in a case such as this. The Government contended that the states waive any immunity from such an award by participation in the litigation. "In choosing to defend an action properly brought in a federal forum, defendants must assume responsibility for the normal incidents of such a suit, including costs, witness fees, and attorneys' fees." Brief for the United States, pp. 16-17. Expressly referring to Mr. Justice Marshall's dissent in *Edelman* v. *Jordan, supra,* p. 32, the United States asserted "There are considerations which suggest that the Eleventh Amendment is limited in part by the Fourteenth and that issue must eventually be decided (perhaps in a case seeking 'damages' for Fourteenth Amendment violations)." Brief for United States, p. 15, n.8. The Government expressly relied on *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70 (1927), on this Court's affirmance of *Sims* v. *Amos,* 409 U.S. 942 (1972), and contended that counsel fees were within the "ancillary effect on the state treasury" permitted by *Edelman.* Brief for the United States, pp. 7, 18-20.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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APPENDIX

[CAPTION]

District Court Order Granting Applications for Attorneys Fees and Expenses

[Entered: May 19, 1972]

Battisti, C.J.:

Counsel for plaintiffs have made application for the allowance of attorney's fees and expenses *to date*. There is no opposition to the amounts requested and they seem reasonable on their face.

Therefore, the State of Ohio, through John J. Gilligan, Governor; Joseph T. Ferguson, State Auditor; Ted W. Brown, Secretary of State; Anthony O. Calabrese, Sr., State Senator; and Robert A. Manning, State Representative, collectively, in their official capacities, and as the persons responsible for apportioning the State of Ohio, are ordered and directed to pay attorney's fees to Nathaniel R. Jones in the sum of $15,580.00 and expenses in the sum of $799.64 and are ordered and directed to pay attorney's fees to Albert J. Ortenzio in the sum of $10,430.00 and expenses in the sum of $463.01.

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Frank J. Battisti
Chief Judge

[CAPTION]

District Court Order Directing That Plaintiff's Attorney's Fees and Expenses Be Taxed as Costs

[Filed: January 17, 1973]

By previous order entered by this Court the State of Ohio was ordered to pay Plaintiff's attorneys' fees in this action. The Court now being advised that the State of Ohio has failed and contiues to refuse to comply with said order, now directs that Plaintiff's attorneys' fees and expenses be taxed as costs in this action.

Accordingly, costs, including Plaintiff's attorneys' fees and expenses as previously ordered paid in the amount of $27,272.65 shall be taxed as costs against the State of Ohio.

It is so ORDERED.

.....

Judge

Date: January 17, 1973

[CAPTION]

Opinion and Order Denying Defendants' Motion for Stay of Execution and Vacating Attachment

[Filed: March 9, 1973]

BATTISTI, C.J.:

MEMORANDUM OPINION AND ORDER

The defendant State of Ohio has moved this Court, pursuant to Rule 62(b), Fed.R.Civ.P., for an order staying execution of, or any proceedings to enforce, the order awarding attorneys' fees entered previously. This motion has been denied.

This case has experienced a rather long tenure in this Court, but its end is finally in sight. The Court sees no necessity for reviewing all of the history. However, a short precis of recent events is required. Subsequent to this Court's last order in March, 1972, counsel submitted a bill for attorneys' fees. The State of Ohio wisely decided not to object, because the fees were justified and reasonable. The amounts charged by counsel represents the prevailing hourly rates charged by attorneys in their respective areas. This Court has regularly permitted attorneys to so recover. In fact, in two recent protracted cases Cleveland counsel were paid the prevailing hourly rates.[1] One of these cases involved the apportionment of the City of Cleveland.

The necessity and desirability of allowing attorneys' fees in such cases such as this was best expressed by a

[1] See In the Matter of the Complaint of the Cambria Steamship Company, et al., C 67-61 (U.S.D.C. N.D. Ohio, 1973); see also Kathleen Ann Tanko v. Anthony R. Stringer, et al., C 69-113 (U.S.D.C. N.D. Ohio, 1971).

three-judge district court for the Middle District of Alabama, Northern Division. The Court there said:

> "In instituting the case *sub judice,* plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. See generally *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968); *Miller* v. *Amusement Enterprises, Inc.,* 426 F.2d 534 (5th Cir. 1970). If, pursuant to this action, plaintiffs have benefited their class and have affectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. See *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, *id.,* and to carry out congressional policy. *Lee* v. *Southern Home Sites,* 444 F.2d 143 (5th Cir. 1971).
>
> The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills,* and expanded upon in *Southern Home Sites* and *Bradley* [v. *School Board of Richmond,* 53 F.R.D. 28 (E.D.Va., 1971)]. The benefit accuring to plaintiffs' class from the prosecution of this suit cannot be overemphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindications of federal rights violated under color of state law, 42 U.S.C. 1983, and, more specifically, the protection of

the right to a nondiscriminatory franchise. See the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. 1973; the Civil Rights Acts of 1964, 78 Stat. 241, 42 U.S.C. 1971; of 1960, 74 Stat. 86, and of 1957, 71 Stat. 634; and U.S. Const., amend. XIV and SV. It is of no consequence that the statute under which plaintiffs filed this suit, 42 U.S.C. 1983, is silent on the availability of attorneys' fees. See *Long* v. *Georgia Kraft Co.*, Civil No. 71-1476, 5th Cir., Jan. 28, 1972, and the many cases cited therein; *Knight* v. *Auciello*, 40 U.S. L.Week 2453 (1st Cir. Jan. 17, 1972).

Despite the benefit to plaintiffs' class, however, and despite this suit's effectuating the purpose of congressional legislation, the case *sub judice* is one most private individuals would hesitate to initiate and litigate. Circumstances described in *Bradley* as rendering school desegregation suits unattractive to prospective plaintiffs apply with equal force to reapportionment cases:

> . . . No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class . . . necessarily means that someone—plaintiff or lawyer—must take a great sacrifice unless equity intervenes . . .'

Consequently, in order to attempt to eliminate these impediments to *pro bono publico* litigation, such as is here involved, and to carry out congressional policy, an award of attorneys' fees is essential." *Sims, et al.* v. *Amos, et al.*, 340 F. Supp. 691, 694-695 (M.D. Ala. 1971) (Footnote eliminated).

Opinion and Order Denying Defendants' Motion for Stay of Execution and Vacating Attachment

Some clamor has been generated over the amount of these fees and the necessity of the State to pay them. This clamor is not a part of this Court's record and is not for our consideration. However, it should be noted that counsel have performed a great service for all those who vote in elections for the General Assembly of the State of Ohio. Counsel have devoted many hours to perform a beneficial service for this State. They deserve to be paid for the successful efforts. Plaintiffs then attached a State bank account. The attachment has not been consummated for reasons unknown to this Court. Fortunately, however, the State has come to realize its lawful debt to these men must be paid and has now done so. Therefore, the Marshal is hereby ordered to remove the attachment on the Union Commerce Bank in Cleveland.

It should be noted that although the plaintiffs have been successful in the United States Supreme Court, they are still victimized by frivolous appeals to the United States Court of Appeals for the Sixth Circuit, brought by a lawyer whose ability to comprehend federal practice seems extremely limited. His refusal to obey a clear injunction caused him to be found guilty of contempt by this Court. The appellant in that case suffered the same fate. The Courts should not be used as a sounding board for their political grievances. The proper remedy lies elsewhere, that is to say, in the political process. It is entirely conceivable that counsel may properly seek attorneys' fees from the appellant for his frivolous appeals. However, since this matter is not before the Court, no such determination is made. It is clear, however, that counsel did not comprehend the order to the Supreme Court. Manifestly he was not a proper party to appeal to the United

Opinion and Order Denying Defendants' Motion for Stay of Execution and Vacating Attachment

States Supreme Court pursuant to 28 U.S.C. 1253. Whether he has standing in the Court of Appeals remains to be seen.

On the other hand, counsel for the State of Ohio recognized that there were obvious constitutional infirmities on the face of the first apportionment plan. A new plan was submitted to this Court and it was defended admirably. They recognized the service of plaintiffs' distinguished counsel and therefore did not oppose the fee bills. They knew that almost all the precedent and right reason supports the payment of reasonable attorneys' fees in reapportionment cases. They also knew that to oppose the bills would have been a vain act and that responsible lawyers do not so indulge themselves and their clients.

Accordingly, payment having been executed, the attachment made by plaintiffs on the Union Commerce Bank, Cleveland, Ohio, is hereby vacated.

It is so ORDERED.

[s] Frank J. Battisti

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FRANK J. BATTISTI
Chief Judge

[CAPTION]

Opinion and Order Denying Defendants' Rule 60(b) Motion

[Filed: June 12, 1973]

Battisti, C.J.

Defendants have filed a motion under Rule 60(b) requesting the Court to reconsider the awarding of attorney fees in this case. They allege as a basis for this motion that the Eleventh Amendment to the United States Constitution proscribes the awarding of such fees.

The facts of this case need not be discussed further at this time. Counsel for plaintiff performed a valuable service for the people of the State of Ohio in proposing an acceptable reapportionment plan for the State legislature. The Court awarded reasonable fees as compensation for these services, and counsel for the State neither objected nor appealed when the award was made. Defendants now claim that this award of fees should be reopened under Rule 60(b), alleging for the first time that it is violative of the Eleventh Amendment.

The judgment is not void and, therefore, not subject to being reopened under Rule 60(b)(4). Even assuming, *arguendo,* that the Eleventh Amendment argument were sound, the judgment entered herein is *res judicata* as to any issue which was or *could have been* raised in the initial proceedings. See *Chicot County Drainage District* v. *Baxter State Bank,* 308 US 371 (1940). Thus, the Court need not decide the Eleventh Amendment question at this time. It should be noted in passing, however, that at least one other three-judge court has awarded attorney fees in similar circumstances, *Sims* v. *Amos,* 340 F. Supp. 691 (N.D.

Ala. 1972), *aff'd*, 409 US 942 (1972). More recently, Judge Young considered this argument and rejected it in a detailed and well-reasoned opinion. *Taylor* v. *Perini*, —— F. Supp —— (N.D. Ohio, No. C 69-275, decided May 23, 1973).

Nor is this an appropriate case to consider under Rule 60(b)(6). That rule was clearly designed to operate only in circumstances in which a full and fair hearing was not had in the first instance. Counsel has not attempted to show a "reason justifying relief from the operation of the judgment," other than to present a defense not raised earlier. The adoption of this position would make any judgment subject to reopen upon discovery of additional defenses which were available but not raised at the first trial, and would completey destroy the concept of *res judicata* as that term is generally understood. This could not have possibly been the intention of the drafters of Rule 60(b)(6), for sound public policy has always dictated that there must be an end to litigation at some point. *See Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 US 522 (1931). That point in this case should have been reached long ago.

Defendants have shown no valid reason to justify reopening this case. Accordingly, their motion under Rule 60(b) is denied.

IT IS SO ORDERED.

[s] FRANK J. BATTISTI

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Frank J. Battisti
Chief Judge

Opinion of United States Court of Appeals
April 25, 1974

No. 73-1973

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL J. JORDON, ET AL.,
Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed April 25, 1974.

Before: PECK, MILLER and LIVELY, Circuit Judges.

PECK, Circuit Judge. This is an appeal from an order entered in the district court denying appellants' motion to vacate a prior order of that court awarding attorneys' fees against the State of Ohio. The appellants' principal assertion is that the award was void since, under the Eleventh Amendment to the Constitution of the United States, the State was immune from the award, and the court was without jurisdiction to make it.

The record establishes that in November of 1971, Samuel Jordon filed a class action suit against the members of the Ohio Apportionment Board, a state body responsible for the decennial reapportionment of the Ohio legislature. Included as defendants were state officials and members of the Mahoning County Board of Elections in their official capacities. The State of Ohio was not a named defendant. Plaintiff

sought, on behalf of the class of all Ohio voters, a declaratory judgment that a reapportionment plan adopted by the Board was constitutionally infirm, and he asked that injunctions requiring the Board to establish a revised plan that would satisfy applicable requirements be issued. Plaintiff also prayed for an award of attorneys' fees against the defendants. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1343 for alleged violations of the Fourteenth and Fifteenth Amendments as implemented by 42 U.S.C. § 1983.

The Board's original plan was declared unconstitutional by the three-judge district court convened to hear the case under the terms of 28 U.S.C. § 2281. The district court ordered appellants to submit a new plan that would comply with state and federal constitutional demands. A revised plan was duly submitted to and approved by the court in December of 1971. After allowing appellees 60 days in which to file objections to the revised plan, the court entered a final order adopting it for the decennium.

Counsel for appellees filed applications for awards of attorneys' fees and expenses in the combined amounts of $27,272.65. The district court, in the absence of any objections to the applications from appellants, entered the following order on May 19, 1972:

> "Counsel for plaintiffs have made application for the allowance of attorney's fees and expenses *to date*. There is no opposition to the amounts requested and they seem reasonable on their face.
>
> "Therefore, the State of Ohio, through John J. Gilligan, Governor; . . . collectively, in their official capacities, and as the persons responsible for apportioning the State of Ohio, are ordered and directed to pay attorney's fees . . . ."

Eight months passed and the judgment remained unpaid. On January 17, 1973, the district court ordered the award of attorneys' fees and expenses taxed as costs against the State of

Ohio.[1] Appellees filed a praecipes for a writ of fieri facias against a bank account maintained by the State at a bank in Cleveland, Ohio, and the court acted to enforce it by ordering the bank to pay the contested monies to the clerk of the court.[2]

The appellants filed a motion to vacate the award of attorneys' fees based on Rule 60(b) of the Federal Rules of Civil Procedure, and simultaneously filed a motion for stay of execution pending disposition of the Rule 60(b) motion. Shortly thereafter, but before the writ was enforced, the State paid the $27,272.65 judgment. In response to the voluntary payment, the district court vacated, by order, the attachment of the State's bank account. The court also issued an order denying appellants' Rule 60(b) motion. It was from this denial that the present appeal was perfected.

Rule 60(b), Fed. R. Civ. P., provides in pertinent part as follows: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . ." If, as appellants assert, the award of attorneys' fees and expenses against the State of Ohio was void for lack of jurisdiction, we must reverse. A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. *See generally*, 7 J. Moore, Federal Practice, ¶ 60.25 [2], at 301 (2d ed. 1973).

Before discussing the central issue in this case a few words of clarification are in order. This cause, insofar as the award

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1 "By previous order . . . the State of Ohio was ordered to pay Plaintiff's attorneys' fees in this action. The Court now being advised that the State of Ohio has failed and continues to refuse to comply with said order, now directs that Plaintiff's attorneys' fees and expenses be taxed as costs in this action."

2 "The Court being advised that there are funds being held in excess in the amount of $27,272.65, it is ORDERED that the Union Commerce Bank turn over and deliver funds in the sum of $27,272.65 to the Clerk of this Court forthwith; said amount representing the sum designated and levied upon by the Fieri Facias." Order of February 2, 1973.

of attorneys' fees is concerned, although nominally against the chief executive and other officials of the State of Ohio, in substance and effect was against the State.[3] Any award of attorneys' fees, whether against the State of Ohio or its officials, vitally affects the rights and interests of the State in preserving its revenues. According to the general rule "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury . . . .' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947) . . . ." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *accord*, *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973). And as this Court stated in *Harrison Construction Co.* v. *Ohio Turnpike Com'n.*, 272 F.2d 337, 340 (6th Cir. 1959), "When the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *See*, *Kraus* v. *Rhodes*, 471 F.2d 430 (6th Cir. 1972).

Appellants do not contend that state officials are immune from suits brought to restrain unconstitutional acts undertaken in their official capacities. The law clearly recognized the right of an interested party to force state officials to act in accordance with the Constitution. *Georgia R.R. and Banking Co.* v. *Redwine*, 342 U.S. 299 (1952); *Ex parte Young*, 209 U.S. 123 (1908); *Lee* v. *Board of Regents of State Colleges*, 411 F.2d 1257 (7th Cir. 1971); *Samuel* v. *University of Pittsburgh*, 56 F.R.D. 535 (W.D. Pa. 1972); Wright, Law of Federal Courts, § 48, at 183 (1970). Appellants do assert, however, that both a state and its officials are immune from monetary awards arising in connection with such a suit, even if the awards are for attorneys' fees.

To further sharpen the focus of this inquiry, we note that in the instant case the district court ordered the attorneys'

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[3] There can be no doubt that the district court intended the award of attorneys' fees to run against the State of Ohio, even though the State was not a party to this suit. Although the exact meaning of the court's May 19, 1972 order, quoted in the text, is arguably unclear, any possible misinterpretation was obviated by the January 17, 1973 order (*supra* note 2), and by the subsequent attachment of the State's bank account.

fees taxed as costs, and ordered the State of Ohio to pay the costs.[4] We do not question the general principle that a court may tax attorneys' fees as costs under the appropriate circumstances in cases involving private parties[5] or where sanctioned by statutory law,[6] but it seems basic that if a party is immune from an award of attorneys' fees as such, that immunity is not altered by taxing the fees as part of the costs. If the award is void in one form, it is void in the other.

Stripped of distracting shadow questions, the case before us presents a singular, although by no means simple, issue: Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights? To this inquiry we must respond in the negative.

The Supreme Court reviewed and clarified the principles under which a federal court may award attorneys' fees against an unsuccessful litigant in *Hall* v. *Cole*, 412 U.S. 1 (1973). The Court recognized the existence of a "class benefit" rationale for awarding fees where "plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class . . . .'" *Id.* at 5. The basis of this theory is that because the efforts of the individual plaintiff benefited a group or class of persons, equity requires the group to share the

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[4] Order of January 17, 1973, *supra* note 1.

[5] "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interest of justice so requires." Hall v. Cole, 412 U.S. 1, 4 (1973). Justice has been held to so require where bad faith is exhibited by the unsuccessful litigant or where "plaintiff's successful litigation confers 'a substantial benefit on members of an ascertainable class . . . .'" *Id.* at 5.

This Court has also recognized the equitable power to make such awards. Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965).

We take heed of the fact that in this case there was no evidence of bad faith on the part of appellants or the State of Ohio.

[6] Statutes often provide for awards of attorneys' fees. *See, e.g.*, Clayton Act, 15 U.S.C. § 15; Communications Act of 1934, 47 U.S.C. § 206; Interstate Commerce Act, 49 U.S.C. § 16(2); etc.

financial burden of the plaintiff's litigation. In the instant case, that appellee's prosecution of this suit to bring Ohio's legislative districts within the requirements of the one man — one vote rule benefited every Ohio voter is not questioned. However, as the Supreme Court pointed out in *Hall*, the class benefit theory can only be employed where the court has the requisite jurisdiction to make such an award. 412 U.S. at 5. In this case the district court clearly had jurisdiction over the appellants insofar as the suit involved a plea for injunctive relief to force constitutional reapportionment.

The Eleventh Amendment, however, contains an express constitutional limitation on the power of the federal courts.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

Through judicial interpretation, this amendment has been held to bar a citizen who would bring suit against his own state. *Employees* v. *Missouri Public Health Dep't.*, 411 U.S. 279 (1973); *Parden* v. *Terminal Ry. of the Alabama State Docks Dep't.*, 277 U.S. 184 (1964). This amendment has also been found to be the embodiment of the doctrine of sovereign immunity. *Adams* v. *Harris County, Texas*, 316 F. Supp. 938 (S.D. Texas 1970), *rev'd on other grounds*, 452 F.2d 994 (5th Cir. 1971). The sovereign immunity of the states is, then, a limitation of federal judicial power, that is, on the constitutional grant of jurisdiction to the federal courts.

As stated heretofore, the Eleventh Amendment's immunity is unavailable to state officials where an action of constitutional proportions is brought for injunctive relief. *Georgia R.R. and Banking Co.* v. *Redwine*, *supra*, etc. The rationale behind the doctrine of sovereign immunity is the protection of the states' fiscal integrity. *See*, *Land* v. *Dollar*, *supra*; *Dugan* v. *Rank*, *supra*; *Harrison Construction Co.* v. *Ohio Turnpike*

Com'n., supra. "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman* v. *Jordon*, 42 U.S.L.W. 4419, 4422 (U.S. March 26, 1974); *accord, Kraus* v. *Rhodes, supra.*

In *Sincock* v. *Obara*, 320 F. Supp. 1098 (Del. 1970), a reapportionment suit similar to the one at bar, a three-judge district court concluded that an award of attorneys' fees could not be made against the State of Delaware because of the prohibition contained in the Eleventh Amendment. On the other hand, appellees point out that in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), the district court awarded attorneys' fees against Alabama's state legislators, secretary of state, attorney general and governor on the basis of the class benefit doctrine. Unfortunately, it is impossible to determine from the opinion whether the award was made against the above officials in their official capacities or as private individuals, there is no indication that the State of Alabama was held liable, and the court did not deal with the Eleventh Amendment problems presented here.[7]

Sims was appealed to the Supreme Court. Appellees assert that the Supreme Court's affirmance of *Sims*, 409 U.S. 942 (1972), conclusively establishes a district court's power to award attorneys' fees against a state in a suit brought to enforce constitutional rights. We do not agree. *Sims* v. *Amos* was reported in two segments at the district court level: the first report, dealing with the substantive reapportionment issues, is found at 336 F.Supp. 924, while the decision involving the claim for attorneys' fees appears at 340 F. Supp. 691. The affirmance relied upon so heavily by appellees was by an order without opinion which noted only that *Sims* v. *Amos*, 336 F. Supp. 924, was affirmed. 409 U.S. at 942. The implications of the Court's failure to mention the portion of *Sims*

[7] The Eleventh Amendment was mentioned by the district court in *Sims* but only in a footnote, and not on the precise question before this Court. Sims v. Amos, 340 F. Supp. 691, 694, n. 8.

appearing in 340 F. Supp. are unclear, but in any case, we are unable to find in the simple order of affirmance on the reapportionment issues any helpful precedent on the Eleventh Amendment question here presented.

In *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), the court affirmed an award of attorneys' fees against officials of the State of Mississippi responsible for impermissible conditions found in a state prison. The court approved the award even though the district court had prescribed that it was to be paid "from funds which the Mississippi Legislature, at its 1973 Session, may appropriate for the operation of the Mississippi State Penitentiary . . . ." 489 F.2d at 303. In reaching its decision the court concluded that an "award of attorney's fees is not an award of damages against the State, even though funds come from the state appropriations," and therefore, it was not barred by the principle of sovereign immunity or by the Eleventh Amendment. 489 F.2d at 302. Primary reliance was placed upon *Sims* v. *Amos, supra*, although the court did cite a number of other cases for support.[8] Whether an award of attorneys' fees differs from an award of damages seems to us to be irrelevant, and we respectfully decline to adopt the position taken by the Fifth Circuit. For the reasons stated above, we find no precedent for such an award in *Sims*, and the balance of the cited cases dealt with awards against local governmental units, bodies which are not clothed with immunity.

Appellees have also called attention to two recent district court cases, *Taylor* v. *Perini*, 359 F. Supp. 1185 (N.D. Ohio 1973) and *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), in which, in our opinion, misplaced reliance on *Sims* was found to be dispositive. In *Taylor*, the court held that the Eleventh Amendment does not immunize an official of

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[8] Brewer v. School Board of City of Norfolk, Va., 456 F.2d 943 (4th Cir. 1972), *cert. denied*, 406 U.S. 933; Thompson v. Richland Parish Police Jury, 478 F.2d 1401 (5th Cir. 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972).

the State of Ohio from an award of attorneys' fees, and ordered that state to pay the award. *La Raza Unida* involved a similar question on the propriety of an award of attorneys' fees against an officer of the State of California, and the court reached the same result. Once again, we point out that in our opinion, *Sims* does not provide any assistance in deciding the Eleventh Amendment question here presented. Further, we note that in the *La Raza Unida* case, the court was much impressed by a California statute which provided that monetary claims against state officers were to be reimbursed by the state. Whether the court considered this a waiver of immunity does not appear, but the Supreme Court of Ohio has specifically held that the State of Ohio is immune from awards of attorneys' fees in the absence of a consent rendered by a two-thirds vote of the General Assembly. *Grandle* v. *Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959); *see also*, Constitution of Ohio, Art. III, §§ 22 & 29. We hold that where, as here, a state has not waived its sovereign immunity, the Eleventh Amendment bars a federal court from awarding attorneys' fees against it.

One of the reasons given by the district court in this case for denying appellants' Rule 60(b) motion was that, "the judgment entered herein is *res judicata* as to any issue which was or could have been raised in the initial proceedings." While it is true, as the district court pointed out, that appellants failed to object to the award until after the judgment was entered and execution proceedings undertaken, there are two reasons why the court should have granted the motion to vacate. First, a void judgment is no judgment at all and is without legal effect. *Lubben* v. *Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972). Secondly, the doctrine of "res judicata does not preclude a litigant from making a direct attack [under Rule 60(b)] upon the judgment before the court which rendered it." 1B J. Moore, Federal Practice, ¶ 0.407, at 931 (2d ed. 1973); *see, United States* v. *United States Fidelity Guaranty Co.*, 309 U.S. 506 (1940); *see also,*

Lubben v. *Selective Service System Local Bd. No. 27, supra,* at 649.

Closely allied to the district court's reasons for denying the motion to vacate is appellees' suggestion that appellants and the State of Ohio have, by their failure to object until after the judgment and payment, waived any immunity they may have had. A party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of the failure to object prior to, or at the time of, entry of the judgment.

> "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this court will consider the issue arising under the Amendment in this case even though argued for the first time in this court." *Ford Motor Co.* v. *Dep't of Treasury of Indiana,* 323 U.S. 459, 467 (1945).

And, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . . ." *Edelman* v. *Jordon,* 42 U.S.L.W. 4419, 4427 (U.S. March 25, 1974). Thus, once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction. In light of the above analysis it is clear that the denial of appellants' motion to vacate under Fed. R. Civ. P. 60(b) was erroneous.

Lastly, appellees ask that we consider how critically important it is for plaintiffs in public interest litigation to have the right to obtain awards of attorneys' fees and expenses. We fully recognize the often valuable service performed by the so-called "private attorney general" in protecting the constitutional rights of large segments of our society, but we are also mindful of the clear limitation on federal jurisdiction in the Eleventh Amendment. This decision does not

affect in any way the validity of awarding attorneys' fees against non-sovereign defendants, and in view of its limited scope it is difficult to see why it would have the dire consequence of preventing public interest litigation that appellees envision.

The judgment of the district court entered June 12, 1973, denying appellants' motion to vacate the award of attorneys' fees and expenses is reversed, and the order of the district court dated May 19, 1972, is vacated. Each party shall pay its own costs on appeal.

Opinion of United States Court of Appeals
July 18, 1974

No. 73-1973

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL J. JORDON, ET AL.,
Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed July 18, 1974

Before: PECK, MILLER and LIVELY, Circuit Judges.

PECK, Circuit Judge. This opinion is filed vice the opinion filed April 25, 1974, pursuant to an order entered herein of even date herewith granting defendants-appellants' motion for a rehearing and withdrawing the April 25, 1974 opinion.

This is an appeal from an order entered in the district court denying appellants' motion to vacate a prior order of that court awarding attorneys' fees against the State of Ohio. The appellants' principal assertion is that the award was void since, under the Eleventh Amendment to the Constitution of the United States, the State was immune from the award, and the court was without jurisdiction to make it.

The record establishes that in November of 1971, Samuel Jordon filed a class action suit against the members of the Ohio Apportionment Board, a state body responsible for the decennial reapportionment of the Ohio legislature. Included as defendants were state officials and members of the Mahoning County Board of Elections in their official capacities.

The State of Ohio was not a named defendant. Plaintiff sought, on behalf of the class of all Ohio voters, a declaratory judgment that a reapportionment plan adopted by the Board was constitutionally infirm, and he asked that injunctions requiring the Board to establish a revised plan that would satisfy applicable requirements be issued. Plaintiff also prayed for an award of attorneys' fees against the defendants. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1343 for alleged violations of the Fourteenth and Fifteenth Amendments as implemented by 42 U.S.C. § 1983.

The Board's original plan was declared unconstitutional by the three-judge district court convened to hear the case under the terms of 28 U.S.C. § 2281. The district court ordered appellants to submit a new plan that would comply with state and federal constitutional demands. A revised plan was duly submitted to and approved by the court in December of 1971. After allowing appellees 60 days in which to file objections to the revised plan, the court entered a final order adopting it for the decennium.

Counsel for appellees filed applications for an award of attorneys' fees and expenses in the combined amount of $27,272.65. The district court, in the absence of any objections to the applications from appellants, entered the following order on May 19, 1972:

> "Counsel for plaintiffs have made application for the allowance of attorney's fees and expenses *to date*. There is no opposition to the amounts requested and they seem reasonable on their face.
>
> "Therefore, the State of Ohio, through John J. Gilligan, Governor; . . . collectively, in their official capacities, and as the persons responsible for apportioning the State of Ohio, are ordered and directed to pay attorney's fees . . . ."

Eight months passed and the judgment remained unpaid. On January 17, 1973, the district court ordered the award of attorneys' fees and expenses taxed as costs against the State

of Ohio.[1] Appellees filed a praecipes for a writ of fieri facias against a bank account maintained by the State at a bank in Cleveland, Ohio, and the court acted to enforce it by ordering the bank to pay the contested monies to the clerk of the court.[2]

The appellants filed a motion to vacate the award of attorneys' fees based on Rule 60(b) of the Federal Rules of Civil Procedure, and simultaneously filed a motion for stay of execution pending disposition of the Rule 60(b) motion. Shortly thereafter, but before the writ was enforced, the State paid the $27,272.65 judgment. In response to the voluntary payment, the district court vacated, by order, the attachment of the State's bank account. The court also issued an order denying appellants' Rule 60(b) motion. It was from this denial that the present appeal was perfected.

Rule 60(b), Fed. R. Civ. P., provides in pertinent part as follows: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . ." If, as appellants assert, the award of attorneys' fees and expenses against the State of Ohio was void for lack of jurisdiction, we must reverse. A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. *See generally*, 7 J. Moore, Federal Practice, ¶ 60.25 [2], at 301 (2d ed. 1973).

Before discussing the central issue in this case a few words of clarification are in order. This cause, insofar as the award

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1 "By previous order . . . the State of Ohio was ordered to pay Plaintiff's attorneys' fees in this action. The Court now being advised that the State of Ohio has failed and continues to refuse to comply with said order, now directs that Plaintiff's attorneys' fees and expenses be taxed as costs in this action."

2 "The Court being advised that there are funds being held in excess in the amount of $27,272.65, it is ORDERED that the Union Commerce Bank turn over and deliver funds in the sum of $27,272.65 to the Clerk of this Court forthwith; said amount representing the sum designated and levied upon by the Fieri Facias." Order of February 2, 1973.

of attorneys' fees is concerned, although nominally against the chief executive and other officials of the State of Ohio, in substance and effect was against the State.[3] Any award of attorneys' fees, whether against the State of Ohio or its officials, vitally affects the rights and interests of the State in preserving its revenues. According to the general rule "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury . . . .' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947) . . . ." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *accord*, *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973). And as this Court stated in *Harrison Construction Co.* v. *Ohio Turnpike Com'n.*, 272 F.2d 337, 340 (6th Cir. 1959), "When the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Appellants do not contend that state officials are immune from suits brought to restrain unconstitutional acts undertaken in their official capacities. The law clearly recognizes the right of an interested party to force state officials to act in accordance with the Constitution. *Georgia R.R. and Banking Co.* v. *Redwine*, 342 U.S. 299 (1952); *Ex parte Young*, 209 U.S. 123 (1908); *Lee* v. *Board of Regents of State Colleges*, 441 F.2d 1257 (7th Cir. 1971); *Samuel* v. *University of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972); Wright, Law of Federal Courts, § 48, at 183 (2d ed. 1970). Appellants do assert, however, that both a state and its officials are immune from monetary awards arising in connection with such a suit, even if the awards are for attorneys' fees.

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[3] There can be no doubt that the district court intended the award of attorneys' fees to run against the State of Ohio, even though the State was not a party to this suit. Although the exact meaning of the court's May 19, 1972 order, quoted in the text, is arguably unclear, any possible misinterpretation was obviated by the January 17, 1973 order (*supra* note 2), and by the subsequent attachment of the State's bank account.

To further sharpen the focus of this inquiry, we note that in the instant case the district court ordered the attorneys' fees taxed as costs, and ordered the State of Ohio to pay the costs.[4] We do not question the general principle that a court may tax attorneys' fees in the appropriate circumstances in cases involving private parties[5] or where sanctioned by statutory law,[6] but it seems basic that if a party is immune from an award of attorneys' fees as such, that immunity is not altered by taxing the fees as part of the costs. If the award is void in one form, it is void in the other.

Stripped of distracting shadow questions, the case before us presents a singular, although by no means simple, issue: Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights? To this inquiry we must respond in the negative.

The Supreme Court reviewed and clarified the principles under which a federal court may award attorneys' fees against an unsuccessful litigant in *Hall* v. *Cole*, 412 U.S. 1 (1973). The Court recognized the existence of a "class benefit" rationale for awarding fees where "plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class . . . .'" *Id.* at 5. The basis of this theory is that

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[4] Order of January 17, 1973, *supra* note 2.

[5] "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interest of justice so requires." *Hall* v. *Cole*, 412 U.S. 1, 4 (1973). Justice has been held to so require where bad faith is exhibited by the unsuccessful litigant or where "plaintiff's successful litigation confers 'a substantial benefit on members of an ascertainable class . . . .'" *Id.* at 5.

This Court has also recognized the equitable power to make such awards. *Smoot* v. *Fox*, 353 F.2d 830 (6th Cir. 1965).

We take heed of the fact that in this case there was no evidence of bad faith on the part of appellants or the State of Ohio.

[6] Statutes often provide for awards of attorneys' fees. *See, e.g.*, Clayton Act, 15 U.S.C. § 15; Communications Act of 1934, 47 U.S.C. § 206; Interstate Commerce Act, 49 U.S.C. § 16(2); etc.

because the efforts of the individual plaintiff benefited a group or class of persons, equity requires the group to share the financial burden of the plaintiff's litigation. In the instant case, that appellee's prosecution of this suit to bring Ohio's legislative districts within the requirements of the one man – one vote rule benefited every Ohio voter is not questioned. Implicit in the Court's holding was the fact that the class benefit theory can only be employed where a court has the requisite jurisdiction to make such an award. 412 U.S. at 5. In this case the district court clearly had jurisdiction over the appellants insofar as the suit involved a plea for injunctive relief to force constitutional reapportionment.

The Eleventh Amendment, however, contains an express constitutional limitation on the power of the federal courts.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

Through judicial interpretation, this amendment has been held to bar a citizen who would bring suit against his own state. *Employees* v. *Missouri Public Health Dep't.*, 411 U.S. 279 (1973); *Parden* v. *Terminal Ry. of the Alabama State Docks Dep't.*, 377 U.S. 184 (1964). This amendment has also been found to be the embodiment of the doctrine of sovereign immunity. *Adams* v. *Harris County, Texas*, 316 F. Supp. 938 (S.D. Texas 1970), *rev'd on other grounds*, 452 F.2d 994 (5th Cir. 1971). The sovereign immunity of the states is, then, a limitation of federal judicial power, that is, on the constitutional grant of jurisdiction to the federal courts.

As stated heretofore, the Eleventh Amendment's immunity is unavailable to state officials where an action of constitutional proportions is brought for injunctive relief. *Georgia R.R. and Banking Co.* v. *Redwine, supra*, etc. The rationale behind the doctrine of sovereign immunity is the protection

of the states' fiscal integrity. *See, Land* v. *Dollar, supra; Dugan* v. *Rank, supra; Harrison Construction Co.* v. *Ohio Turnpike Com'n., supra.*

Appellees place primary reliance on *Sims* v. *Amos,* 340 F. Supp. 691 (M.D.Ala. 1972), a reapportionment suit involving the State of Alabama. Therein a three-judge district court awarded attorneys' fees against Alabama's governor, attorney general, secretary of state and state legislators on the basis of the class benefit doctrine. Although the opinion does not state that the award was made against the above officials in their official capacities, it is clear that that was indeed the case. We note, however, that the Eleventh Amendment problem before us was disposed of in rather summary fashion in a footnote to the opinion.[7] *Sims* was appealed to the Supreme Court. Appellees assert that the Supreme Court's summary affirmance of *Sims,* 409 U.S. 942 (1972), constitutes binding precedent on this Court in the case under consideration. We do not agree.

In our original opinion in the present case we pointed out that *Sims* was reported in two separate segments at the district level. The initial *Sims* opinion, dealing with the substantive reapportionment issues, was reported at 336 F. Supp. 924, while the decision involving attorneys' fees appeared at 340 F. Supp. 691. We also noted that the Supreme Court's order of affirmance stated only that *Sims* v. *Amos,* 336 F. Supp. 924, was affirmed.[8] Since that time, however, it has come to our attention that in the bound version of Volume 409

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[7] "8. Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such a case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto." *Sims* v. *Amos,* 340 F.Supp. 691, 694, n. 8 (M.D. Ala. 1972) (citations omitted).

[8] The Preliminary Print of Volume 409 of the Official Reports of The Supreme Court (United States Reports) contained the following statement at 942: "No. 72-12. Amos, Secretary of State of Alabama, et al. v. Sims et al. Affirmed on appeal from D.C.M.D.Ala. Reported below: 336 F.Supp. 924."

of the United States Reports that order has been expanded; it now states that both 336 F. Supp. 924 and 340 F. Supp. 691 were affirmed.[9] That modification,[10] while it has prompted us to revise our original opinion, does not alter the conclusion reached therein.

Decisions of the United States Supreme Court rendered by written opinions are binding on all courts, state and federal. The Court's holding is stare decisis and cannot be overruled except by the Court itself. Even the Court's dicta is of persuasive precedential value. However, "[a] summary affirmance without opinion in a case *within the Supreme Court's obligatory appellate jurisdiction* [such as *Sims*] has very little precedential significance." *Dillenburg* v. *Kramer*, 469 F.2d 1222, 1225 (7th Cir. 1972) (emphasis added) (citations omitted).

Two months after *Dillenburg* was announced, the Seventh Circuit made the following apparently inconsistant statement relative to this issue: "[A] summary affirmance [by the Supreme Court] is a decision on the merits having precedential value." *Jordan* v. *Weaver*, 472 F.2d 985, 989 (7th Cir. 1973). In *Jordan* the court relied upon three separate three-judge district court decisions which had been summarily affirmed by the Supreme Court,[11] and upon one similar decision which had been affirmed by an opinion which did not mention the question in dispute (award of retroactive benefits)[12] in reaching its de-

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[9] The bound version of volume 409 U.S. 942 states as follows: "No. 72-12. Amos, Secretary of State of Alabama, et al. v. Sims et al. Affirmed on appeal from D.C.M.D.Ala. Reported below: 336 F.Supp. 924; 340 F.Supp. 691."

[10] One court has attributed "the court's omission [of 340 F. Supp. 691] to inadvertence." *See Skehan* v. *Board of Trustees*, *infra*.

[11] *State Dep't of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F.Supp. 1004 (S.D. Fla. 1971); *Sterrett* v. *Mothers and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported order and judgment of N.D. Ind. 1972 *on remand from Carpenter* v. *Sterrett*, 405 U.S. 971 (1971); *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1968), *aff'd per curiam sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1969).

[12] *Shapiro* v. *Thompson*, 270 F. Supp. 331 (D.C. Conn. 1967), *aff'd.*, 394 U.S. 618 (1969).

cision that the Eleventh Amendment did *not* bar actions against state officials for retroactive welfare payments. That decision was subsequently reversed by the Supreme Court. *Edelman* v. *Jordan*, 94 S.Ct. 1347 (1974). Mr. Justice Reinquist, writing for a majority of the Court, touched upon the validity of summary affirmances:

> "*Shapiro* v. *Thompson* and these three summary affirmances [see footnotes 11 & 12 and accompanying text] obviously are of precedental [sic] value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously they are not of the same precedental [sic] value as would be an opinion of this Court treating the question on the merits." *Edelman, supra*, 94 S.Ct. at 1359.

This position is in accordance with the views of the commentators:

> "While per curiam affirmances by the Supreme Court have been held to be binding precedents in later cases in the lower courts, they have so frequently proved to be such a shaky guide to the outcome of later full-dress considerations, that in many decisions in the district courts and courts of appeals they have received but scant attention. 1B J. Moore, Federal Practice, ¶0.402[2] (1973 Supp. at pp. 13-14).

For the reasons stated above, it is concluded that the Supreme Court's summary affirmance of *Sims* v. *Amos* does not constitute controlling precedent on the Eleventh Amendment question herein presented.

There is no dearth of reported decisions on the attorneys' fees issue in lower federal courts. *Sims* has been cited with approval and construed as precedent for awarding attorneys' fees against states and their officials in the following cases. E.g., *Jordan* v. *Fusari*, No. 582 (2d Cir., filed April 29, 1974);

Bradenburger v. *Thompson*, No. 72-2224 (9th Cir., filed March 25, 1974); *Cates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973); *Taylor* v. *Perini*, 359 F.Supp. 1185 (N.D. Ohio 1973), *appeal argued*, No. 73-2071 (6th Cir., April 15, 1974); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1974) (no reference made to attorneys' fees issue).

In *La Raza Unida* v. *Volpe*, *supra*, the district court was much impressed by a California statute which provided that money claims against state officials were to be reimbursed by the state. Whether the court considered this a waiver of immunity does not appear, but the Supreme Court of Ohio has specifically held that the State of Ohio is immune from awards of attorneys' fees in the absence of a consent rendered by a two-thirds vote of the General Assembly. *Grandle* v. *Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959); *see also*, Constitution of Ohio, Art. III, §§ 22 & 29. The State of Ohio has not waived its immunity in this case.

In *Gates* v. *Collier*, *supra*, the Fifth Circuit affirmed an award of attorneys' fees against officials of the State of Mississippi responsible for impermissible conditions found in a state prison. In reaching its decision the court concluded that an "award of attorney's fees is not an award of damages against the State, even though funds for the payment of costs come from the state appropriations." 489 F.2d at 302. Whether an award of attorneys' fees differs from an award of damages seems to us to be irrelevant, and we respectfully decline to adopt the position taken by the Fifth Circuit. The balance of the cases mentioned above rely in varying degrees upon *Sims* and each other. As stated hereinabove, we find no reasonable basis for concluding that the Eleventh Amendment does not bar awards of attorneys' fees against the sovereign states.

However, lower court decisions have not been unanimous. In *Sincock* v. *Obara*, 320 F. Supp. 1098 (Del. 1970), a three-

judge district court concluded that an award of attorneys' fees could not be made against the State of Delaware because of the prohibition contained in the Eleventh Amendment. The same result was reached by the Third Circuit in *Skehan* v. *Board of Trustees, Bloomsburg State College*, No. 73-1613 (3rd Cir., filed May 3, 1974). In *Skehan* Judge Gibbons held that "Edelman, [*Edelman* v. *Jordan, supra*] while not ruling on the matter specifically, appears to bar the award of attorneys fees from the state treasury as well." (Slip opinion at 18.)

Skehan involved, among other things, a claim for an attorney's fee against the defendant state college. The court remanded the case to the district court for a determination of the exact legal status of defendant under Pennsylvania law, stating that if it were not clothed with sovereign immunity the attorney's fee could be awarded against it. The Court discussed *Sims* in a footnote, which we quote in its entirety:

> "7. The contention could be made that, by failing to expressly overrule its summary affirmance in *Sims* v. *Amos*, 409 U.S. 942 (1972), *aff'g* 336 F. Supp. 924 (M.D. Ala. 1972) (3-judge court) of an award of attorneys fees against state officers which was to be satisfied from the state treasury, the Court meant to leave the issue open. *See Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973) following *Sims* and quoting the jurisdictional statement raising the eleventh amendment issue before the Court. Such a conclusion would, however, be inconsistent with the *Edelman* Court's rationale. We attribute the Court's omission to inadvertence. For a listing of other decisions overruled, *see* note 6 *supra*.

"Skehan, pointing to language in Justice Marshall's dissent in *Edelman* v. *Jordan, supra*, contends that the liability of the Commonwealth for retroactive benefits in his case is still open. Justice Marshall wrote:

> 'It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue.' 42 U.S.L.W. at 4432 n. 2.

An appreciation of this cryptic comment requires some refined analysis of the issues dealt with in Justice Rehnquist's majority opinion. Claims for money against a state can arise in three separate legal frameworks. First the claim may be based upon state law, purely and simply; breach of contract, for example. Second, it may be based upon federal law made binding upon the states by virtue of the supremacy clause; nonpayment of benefits mandated by the Social Security Act, for example. Third, it may be based upon the fourteenth amendment, which binds the states directly and under § 5 of which Congress has the power to create remedies. *Edelman* involves retroactive welfare benefits withheld in violation of the Social Secruity Act, and thus falls in the second legal framework. A fourteenth amendment claim provided a basis for federal jurisdiction, but was not decided. *See Hagans* v. *Lavine*, 42 U.S.L.W. 4381 (U.S. March 25, 1974). Thus Justice Marshall is technically correct that *Edelman* does not dispose of the third category. But the majority opinion expressly overrules *Shapiro* v. *Thompson, supra, State Department of Health and Rehabilitative Services* v. *Zarate, supra,* and *Wyman* v. *Bowens, supra,* all fourteenth amendment cases. *We think Edelman must be read as closing the door on any money award from a*

state treasury in any category." (Slip opinion, n. 7, p. 18) (emphasis supplied).

Careful study of the *Edelman* opinion leads us to conclude, as did the Third Circuit, that the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states. We note in particular the following language from that opinion: "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman, supra*, 94 S. Ct. at 1356. Although appellees urge that attorneys' fees are analogous to costs, the taxing of which is permitted against states,[13] the test for determining whether a particular type of relief passes muster, as set out in *Edelman*, indicates the opposite. The Amendment bars any award which is "[m]easured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman, supra*, 94 S. Ct. at 1358. In our opinion, awards of attorneys' fees fall within that classification and are, therefore, barred.

One of the reasons given by the district court in this case for denying appellants' Rule 60(b) motion was that "the judgment entered herein is *res judicata* as to any issue which was or could have been raised in the initial proceedings." While it is true, as the district court pointed out, that appellants failed to object to the award until after the judgment was entered and execution proceedings undertaken, there are two reasons why the court should have granted the motion to vacate. First, a void judgment is no judgment at all and is without legal effect. *Lubben* v. *Selective Service System Local Bd. No.* 27, 453 F.2d 645 (1st Cir. 1972). Secondly, the doctrine of "res judicata does not preclude a litigant from making a direct attack [under Rule 60(b)] upon the judgment before

[13] *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927).

the court which rendered it." 1B J. Moore, Federal Practice, ¶ 0.407, at 931 (2d ed. 1973); *see, United States* v. *United States Fidelity Guaranty Co.*, 309 U.S. 506 (1940); *see also, Lubben* v. *Selective Service System Local Bd. No. 27, supra,* at 649.

Closely allied to the district court's reasons for denying the motion to vacate is appellees' sugestion that appellants and the State of Ohio have, by their failure to object until after the judgment and payment, waived any immunity they may have had. A party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of the failure to object prior to, or at the time of, entry of the judgment.

> "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this court will consider the issue arising under the Amendment in this case even though argued for the first time in this court." *Ford Motor Co.* v. *Dep't of Treasury of Indiana*, 323 U.S. 459, 467 (1945).

And, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . . ." *Edelman* v. *Jordan*, 94 S. Ct. 1347, 1363 (1974). Thus, once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction. In light of the above analysis it is clear that the denial of appellants' motion to vacate under Fed. R. Civ. P. 60(b) was erroneous.

Finally, appellees ask that we consider how critically important it is for plaintiffs in public interest litigation to have the right to obtain awards of attorneys' fees and expenses. We fully recognize the often valuable service performed by the so-called "private attorney general" in protecting the constitutional rights of large segments of our society, but we

are also mindful of the clear limitation on federal jurisdiction in the Eleventh Amendment. This decision does not affect in any way the validity of awarding attorneys' fees against non-sovereign defendants, and in view of its limited scope it is difficult to see why it would have the dire consequence of preventing public interest litigation that appellee envisions.

The judgment of the district court entered June 12, 1973, denying appellants' motion to vacate the award of attorneys' fees and expenses is reversed, and the order of the district court dated May 19. 1972, is vacated.

COURT, U. S.

FILE

DEC 5 19

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-403

SAMUEL J. JORDON, et al.,

Petitioners,

v.

JOHN J. GILLIGAN, et al.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Samuel Jordon, et al., submit this supplemental memorandum in support of their Petition for Writ of Certiorari.

The decision of the Sixth Circuit below is squarely in conflict with the decision of the Second Circuit Court of Appeals in *Class* v. *Norton* (No. 74-1702, October 10, 1974), pp. 1aa-10aa. The Second Circuit expressly considered the effect of *Edelman* v. *Jordan,* 39 L.Ed. 2d 662 (1974), and concluded that *Edelman* did not preclude an award of counsel fees against state employees in their official capacity. Pp. 5aa-7aa. The state in *Class* v. *Norton* expressly relied on the decision of the Sixth Circuit in the instant case,[1] but the Second Circuit declined to follow the reasoning of the Sixth Circuit.

In order to resolve this conflict among the circuits on an important question of law, a Writ of Certiorari should

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[1] Brief for Appellant, pp. 13-14; Reply Brief of Defendant-Appellant to Brief of Amicus Curiae, pp. 3-5, No. 74-1702.

issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—September Term, 1974.

(Argued September 9, 1974 Decided October 10, 1974.)

Docket No. 74-1702

ELENA CLASS, *et al.*,

Plaintiffs-Appellees,

v.

NICHOLAS NORTON, *et al.*,

Defendants-Appellants.

Before:

SMITH, TIMBERS and GURFEIN,*

Circuit Judges.

Appeal by Nicholas Norton, Connecticut Welfare Commissioner, from the ruling of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* 376 F. Supp. 496 (D. Conn. 1974), denying appellees' motion for contempt but requiring compliance with earlier orders and assessing appellees' attorneys' fees and costs against appellant in his individual and official capacities.

* At the time of oral argument, Judge Gurfein was a United States District Judge for the Southern District of New York, sitting by designation.

Reversed as to individual liability of appellant; affirmed in all other respects.

EDMUND C. WALSH, Asst. Attorney General (Robert K. Killian, Attorney General, State of Connecticut, Hartford, Conn.), *for Appellant.*

JAMES C. STURDEVANT (Tolland-Windham Legal Assistance, Inc., Rockville, Conn.), Marilyn Katz (Fairfield County Legal Services, Inc., Bridgeport, Conn.), *for Appellees.*

ARMAND DEFFNER (Epstein & McClain, Charleston, S.C.), J. Harold Flannery, (Lawyers' Committee for Civil Rights Under Law, Washington, D.C.), and Martha G. Bannerman, New York, N.Y., *on the brief for Lawyers' Committee for Civil Rights Under Law, as Amicus Curiae.*

SMITH, *Circuit Judge:*

Nicholas Norton, Commissioner of Welfare for Connecticut, appeals from the ruling on a motion for contempt rendered by then Chief Judge M. Joseph Blumenfeld of the District of Connecticut on March 22, 1974. 376 F. Supp. 496. The court declined to hold appellant in contempt for his alleged failure to comply with orders entered in 1972 calling for timely processing of applications for welfare assistance under the state program of Aid to Families with Dependent Children (AFDC). 42 U.S.C. §601 *et seq.*; 45 C.F.R. §206.10. The court did find significant non-compliance with its prior orders, however, and accordingly: reaffirmed its earlier relief; required that the appellant un-

dertake specified additional measures to ensure compliance with the orders in the future; and assessed a liability of $1,000 against the appellant, in both his individual and official capacities, to cover the appellees' attorneys' fees and costs in bringing the contempt charges. With the exception of the assessment of individual liability, we affirm.

In December, 1971, the appellees, AFDC applicants and recipients, brought a class action against the Connecticut State Welfare Commissioner to compel compliance with federal AFDC regulations requiring a determination of applicant eligibility for assistance within 30 days of making application. Judge Blumenfeld's two orders granting the plaintiffs relief basically required: processing of applications within the 30-day limit; providing assistance to all applicants whose eligibility is not determined within this period; making retroactive payments to eligible persons dating from the date of their application; and issuing bimonthly reports on the number of applications not timely processed. The defendant Commissioner did not appeal from this order.

In January, 1974, the appellees initiated the contempt proceeding presently under review, alleging that the appellant had failed to comply satisfactorily with the terms of the orders. Finding "substantial and widepread" non-compliance, 376 F. Supp. at 498, the court eschewed the requested contempt sanctions in favor of a detailed implementation plan designed to eliminate possible sources of continued non-compliance, *id.* at 501-02. The court accompanied these prophylactic directives, moreover, with a reiteration of its earlier orders. Finally, commending appellees' counsel for their persistence "in the face of unjustified non-compliance with this Court's prior orders," *id.* at 502, Judge Blumenfeld awarded $1,000 for counsels' fees and costs to the movants; liability for this amount

was found against the Commissioner in his official and individual capacities.

The appellant does not take issue with the prospective relief granted by the court. He does question the validity of the $1,000 award against him as well as the court's reaffirmation of its 1972 order to pay retroactive benefits (to date of application) to applicants determined eligible for assistance between the dates of plaintiffs' filing the initial claim and the court's rendering judgment on it.

I. Retroactive Payments

The appellant seizes upon the recently decided case of *Edelman* v. *Jordan*, —— U.S. —— (1974), as a basis for overturning Judge Blumenfeld's ruling with regard to retroactive payments. In *Edelman*, the Supreme Court held that a federal court order requiring state officials to pay retroactive benefits ran afoul of the Eleventh Amendment. Although *Edelman* does figure prominently in the resolution of this appeal, *see* II *infra*, we need not consider its force in the context of the retroactive payment order: The validity of the order is settled by the appellant's failure to make a timely appeal of this order when rendered in June, 1972. The doctrine of *res judicata*, therefore, bars the appellant from securing review of the payment order in this appeal from a proceeding collateral to that one determinative of the merits of the order.

In *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952), the Supreme Court elaborated on this principle of finality:

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a

> judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. [footnotes omitted]

Having allowed the time for a direct appeal of the 1972 order to expire, the Commissioner may not relitigate the substance of that order merely because the court, in its 1974 ruling, saw fit to reiterate that prior order. The 1974 ruling in no sense altered the earlier payment order. *See also, Oriel* v. *Russell,* 278 U.S. 358, 363 (1929); *National Labor Relations Board* v. *Local 282, International Brotherhood of Teamsters,* 428 F.2d 994, 999 (2d Cir. 1970).

We do not comment on the merits of the appellant's contention were it now properly before this court. *See, United States* v. *Secor,* 476 F.2d 766, 770 (2d Cir. 1973). The efficient and fair administration of justice requires that litigation of an issue at some point come to an end. And for the appellant, who has had one opportunity already to contest the payment order, the time to relitigate that issue has necessarily run.

II. The Award of Costs and Attorneys' Fees

The Eleventh Amendment to the Constitution, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," relates only to the appellant's liability in his official capacity as an agent of the State of Connecticut. *See,*

Scheuer v. *Rhodes*, —— U.S. ——, 94 S.Ct. 1683, 1687 (1974); *Moor* v. *County of Alameda*, 411 U.S. 693, 700 (1973). Considerations peculiar to official liability raised by the Eleventh Amendment, therefore—or, more particularly, by the Eleventh Amendment as recently construed in *Edelman* v. *Jordan*, *supra*—indicate the appropriateness of analyzing separately the official and personal liabilities imposed by the court on the Commissioner. The two forms of liability must also be distinguished in terms of the degree of recalcitrance warranting their imposition.

A. *Liability of Appellant in his Official Capacity*

The appellant contends that *Edelman's* proscription against federal courts ordering state officials to pay retroactive benefits immunizes him from liability to the appellees as an agent of the state. He seeks to characterize the $1,000 assessed against him for attorneys' fees and costs as an award akin to retroactive benefits—a drain on the state treasury to compensate for alleged official improprieties in the past.

The district court made this award incident to granting prospective relief: a multiple injunctive order to issue certain regulations, withdraw specified departmental directives, and make designated reports. Of critical importance, then, is the discussion in *Edelman*, *supra*, —— U.S. —— at ——, of "ancillary effects" on the state treasury deriving from compliance with prospective orders of a federal court:

> But the fiscal consequences to state treasuries in these cases [*Ex parte Young*, 209 U.S. 123 (1908); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)] were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees,

> would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*

We have recently commented on the applicability of this "ancillary effect" exception to an award of attorneys' fees:

> Moreover, it appears to us that the allowance [of attorneys' fees] awarded here, as part of an order granting injunctive relief, has at most the "ancillary effect on the state treasury," which *Edelman* v. *Jordan, supra,* —— U.S. —— at ——, characterizes as a "permissible and often inevitable consequence of the principle announced in *Ex parte Young, . . .*"

Jordan v. *Fusari,* 496 F.2d 646, 651 (2d Cir. 1974). Admittedly, that statement was not necessary to our holding in *Jordan* v. *Fusari,* because we had already held *Edelman* inapplicable by reason of the state's Eleventh Amendment waiver in making a settlement for retroactive unemployment benefits. Nonetheless, we are no less persuaded of this position when squarely presented with the issue today. We reaffirm our statement in *Jordan* v. *Fusari, supra,* and extend its application to include an award of costs, which in this context is analytically indistinguishable from one of attorneys' fees.

In finding that the Eleventh Amendment does not immunize the Commissioner from liability in his official capacity, we underline the forward-looking, deterrent nature of this award. Indeed, even without regard to the "ancillary effect" exception of *Edelman,* we would have no difficulty reconciling the award with the retrospective thrust

of *Edelman* as a "necessary result of attempts to gain compliance with a decree which by its terms was prospective in nature." *Rodriguez* v. *Swank*, 496 F.2d 1110, 1113 (7th Cir. 1974) (affirming a lower court order that the state pay $100 to any AFDC applicant whose application is not timely processed in the future.)

Once the state immunity issue is resolved against the appellant, the step to affirming his official liability follows easily. For although the award of costs and attorneys' fees against a defendant may be an extraordinary measure, it is warranted where " 'bringing of the action should have been unnecessary and was compelled by . . . unreasonable, obdurate obstinacy.' " *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 474 F.2d 485, 490 (2d Cir. 1973), *quoting Bradley* v. *School Board of City of Richmond*, 345 F.2d 310, 321 (4th Cir.), *vacated on other grounds*, 382 U.S. 103 (1965). Moreover, insofar as this standard for awarding costs and attorneys' fees[1] has been assimilated to bad faith, *Hall* v. *Cole*, 412 U.S. 1, 5 (1973); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 4 (1968) (*per curiam*), the evidence marshaled by the court sufficiently supports such a finding.

The award of costs and attorneys' fees against the Commissioner in his official capacity was thus an act neither

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1 An award on this basis essentially rests on a punitive rationale. Similar awards have been justified as shifting the costs of litigation from a plaintiff benefiting the members of the body which he is suing as an entity. *See, e.g., Hall* v. *Cole*, 412 U.S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Alternatively a private attorney general theory for making such an award has received approbation where the litigant "(1) furthers the interests of a significant class of persons by (2) effectuating a strong congressional policy." *Brandenburger* v. *Thompson*, 494 F.2d 885, 888 (9th Cir. 1974). *See also, Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.) (three-judge court), *aff'd mem.* 409 U.S. 942 (1972).

in conflict with the Eleventh Amendment nor outside the court's sound discretion as a court of equity.

B. *Liability of Appellant in his Individual Capacity*

Although possible Eleventh Amendment immunity does not bear on the appellant's individual liability for attorneys' fees and costs, he does enjoy the qualified immunity traditionally accorded executive officers. *See, Scheuer* v. *Rhodes, supra,* —— U.S. at ——, 94 S.Ct. at 1692-93; *Barr* v. *Matteo,* 360 U.S. 564, 569-74 (1959) (plurality opinion of Harlan, *J.*); *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2d Cir. 1949). Since this immunity varies in breadth with the "scope of discretion and responsibilities of the office," *Scheuer* v. *Rhodes, supra,* —— U.S. at ——, 94 S.Ct. at 1692, the appellant-Commissioner, one vested with considerable policy-making powers, is cloaked in his individual capacity with a broad immunity for honest mistake.

Proof of bad faith ordinarily suffices to justify an assessment of attorneys' fees and costs against a defendant. *See,* A, *supra.* Where the defendant is insulated from liability by a qualified executive immunity of the scope witnessed here, however, "bad faith" alone in the sense used here as illuminated by the facts found would not appear to be enough. In the absence of malice or a clear abuse of discretion, this punitive award does not lie against the Commissioner. *Cf. Jordan* v. *Weaver,* 472 F.2d 985, 999 (7th Cir. 1973), *rev'd on other grounds, sub nom. Edelman* v. *Jordan,* —— U.S. —— (1974).

In the light of the court's findings, this award against the appellant personally must be reversed. The court specifically declined to infer "willful disobedience" of its prior order, 376 F. Supp. at 498, or any "deliberate design" to nullify that order, *id.* at 500. In addition, "much of the failure of compliance" could be attributed to insufficient

clarification of department policies, *id.* at 501—a lamentable state of affairs to be sure, but hardly the stuff of which a case for malice or abuse of discretion may be made. Thus, without in any way condoning the appellant's conduct in failing properly to implement the court's order, we find ourselves unable to agree with the court below that his conduct was sufficiently reprehensible to warrant assessing $1,000 against him individually. On this issue alone, we reverse.

Reversed as to award against the Commissioner individually. Otherwise affirmed.

SUPREME COURT, U. S.

JAN 15 1975

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

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SAMUEL J. JORDON, *et al.*,

Petitioners,

vs.

JOHN J. GILLIGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

I. Conflict Among the Circuits 2

A. Decisions holding awards of attorneys' fees barred by the Eleventh Amendment 2

B. Decisions upholding awards of attorneys' fees .. 3

II. Importance of Constitutional Question 4

III. Conclusion 6

TABLE OF AUTHORITIES

Cases

Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) 3

Class v. Norton, ... F.2d ..... (No. 74-1702 2d Cir. Oct. 10, 1974) 3

Edelman v. Jordan, 415 U.S. 651 (1974) 1, 5

Gates v. Collier, 489 F.2d 298 (5th Cir. 1973) (rehearing en banc granted) 3, 4

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 3

Jordon v. Gilligan, 500 F.2d 701 (6th Cir. July 18, 1974) *petition for cert. filed* (U.S. Oct. 9, 1974) 5

Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 496 F.2d 1017 (5th Cir. 1974) (rehearing en banc granted) 3, 4

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) *aff'd per curiam*, 409 U.S. 942 (1972) 4

Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. May 3, 1974) *petition for cert. filed* (U.S. Nov. 8, 1974) 2

Taylor v. Perini, 503 F.2d 899 (6th Cir. Oct. 3, 1974) *petition for cert. filed* (U.S. Oct. 30, 1974, No. 74-506) 2, 5-6

Constitution

Constitution of the United States, Eleventh Amendment 2, 3, 4, 5

Supreme Court of the United States

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

Respondents are the State of Ohio, through John J. Gilligan, Governor; Joseph T. Ferguson, State Auditor; Ted W. Brown, Secretary of State; Anthony O. Calabrese, Sr., State Senator; and Robert A. Manning, State Representative, collectively, in their official capacities, and as persons responsible for apportioning the State of Ohio. Although respondents believe the decision of the Sixth Circuit Court of Appeals in this case is correct and in conformity with *Edelman v. Jordan*, 415 U.S. 651 (1974), respondents do not oppose the allowance of a writ of certiorari in this case for the following reasons:

1. Whether the Eleventh Amendment bars an award of attorneys' fees against the State of Ohio is now

ripe for review since there is a conflict among the circuits.

2. The question raised herein is undoubtedly of such importance as to require a Supreme Court determination on the merits.

I. CONFLICT AMONG THE CIRCUITS

A. Decisions holding awards of attorneys' fees barred by the Eleventh Amendment.

Subsequent to the decision of the instant case by the Sixth Circuit Court of Appeals, another panel from that court followed this decision stating:

> "The propriety of an award of attorneys' fees by a federal court against a state or its officials acting in their official capacity has been settled in this Circuit by our recent holding in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), that such an award is barred by the Eleventh Amendment." *Taylor v. Perini*, 503 F.2d 899, 901 (6th Cir. October 3, 1974), *petition for cert. filed* (U.S. October 30, 1974, No. 74-506).

The Third Circuit Court of Appeals in *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. May 3, 1974) *petition for cert. filed* (U.S. Nov. 8, 1974) vacated and remanded the decision of the district court for a determination of whether Bloomsburg State College was an agency of the Commonwealth of Pennsylvania. The Third Circuit then directed:

> "[I]f the court should find that the college is covered by the Commonwealth's state sovereign immunity neither backpay nor attorney fees could be awarded." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d at 45.

Likewise, a panel of the Fifth Circuit Court of Appeals held:

> "It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale 'the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' footnote 12. *Edelman, supra,* 415 U.S. at 663, 94 S. Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy, or under the private attorney general theory against nonstate defendants, are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore, barred." *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 496 F.2d 1017, 1026 (5th Cir. 1974) (rehearing en banc granted).

B. Decisions upholding awards of attorneys' fees.

In *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974), the Second Circuit held that the Eleventh Amendment did not bar an award of attorneys' fees from a state treasury. See also, *Class v. Norton,* ..... F.2d ..... (No. 74-1702 2d Cir. October 10, 1974).

Likewise, in *Brandenburger v. Thompson,* 494 F.2d 885, 888 (9th Cir. 1974), the Ninth Circuit concluded that:

> "An award of attorneys' fees assessed against a state official acting in his or her official capacity is not proscribed by the Eleventh Amendment."

In *Gates v. Collier,* 489 F.2d 298 (5th Cir. 1973) (rehearing en banc granted), a panel of the Fifth Circuit

upheld an award by the district court of attorneys' fees and expenses to plaintiffs' counsel which were taxed as costs against the State of Mississippi and payable from funds which the Mississippi legislature might appropriate for the operation of the Mississippi State Penitentiary. The Fifth Circuit noted that although attorneys' fees and expenses could have been assessed against the individual defendants, the award was not vitiated by virtue of the fact that it was to be paid from the state treasury. The Fifth Circuit has since ordered a rehearing en banc of *Gates v. Collier, supra* and *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, supra.*

In view of the conflict among the circuits concerning the question of whether the Eleventh Amendment bars the award of attorneys' fees from a state treasury, respondents will not discuss the numerous conflicting district court decisions on this subject.

II. IMPORTANCE OF CONSTITUTIONAL QUESTION

There should be no mistaking the significance of this case since the issue of the liability of states and state officials for attorneys' fees is arising with growing frequency. This case is significant because it squarely presents the question of a state's immunity from awards of attorneys' fees. While this court had previously entered a summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.) *aff'd per curiam,* 409 U.S. 942 (1972), the district court there treated the Eleventh Amendment defense only in a footnote. 340 F. Supp. at 694 n. 8. In the instant case, the Sixth Circuit Court of Appeals concluded that the summary affirmance of *Sims v. Amos* did not

constitute controlling precedent on the Eleventh Amendment issue herein. The Sixth Circuit Court of Appeals stated:

> "Mr. Justice Rehnquist, writing for a majority of the Court, touched upon the validity of summary affirmances:
>
> > 'Shapiro v. Thompson and these three summary affirmances [see footnotes 11 & 12 and accompanying text] obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits.' Edelman, supra, 94 S.Ct. at 1359.
>
> "This position is in accordance with the views of the commentators:
>
> > 'While per curiam affirmances by the Supreme Court have been held to be binding precedents in later cases in the lower courts, they have so frequently proved to be such a shaky guide to the outcome of later full-dress considerations, that in many decisions in the district courts and courts of appeals they have received but scant attention.' 1B J. Moore, Federal Practice §0.402[2] (1973 Supp. at pp. 13-14)." *Jordan v. Gilligan*, 500 F.2d 701, 707-8 (6th Cir. July 18, 1974).

In the instant case alone, the district court awarded $27,272.65 of attorneys' fees and expenses to be paid by the State of Ohio. A petition for writ of certiorari is presently pending in another case where a district court awarded $21,055.07 of attorneys' fees and expenses to be paid by the State of Ohio in a similar case. See, *Taylor*

v. Perini, 503 F.2d 899 (6th Cir. October 3, 1974), *petition for cert. filed* (U.S. October 30, 1974, No. 74-506).

Obviously, the fiscal impact of this decision will be substantial.

III. CONCLUSION

For the above reasons, respondents do not oppose the issuance of a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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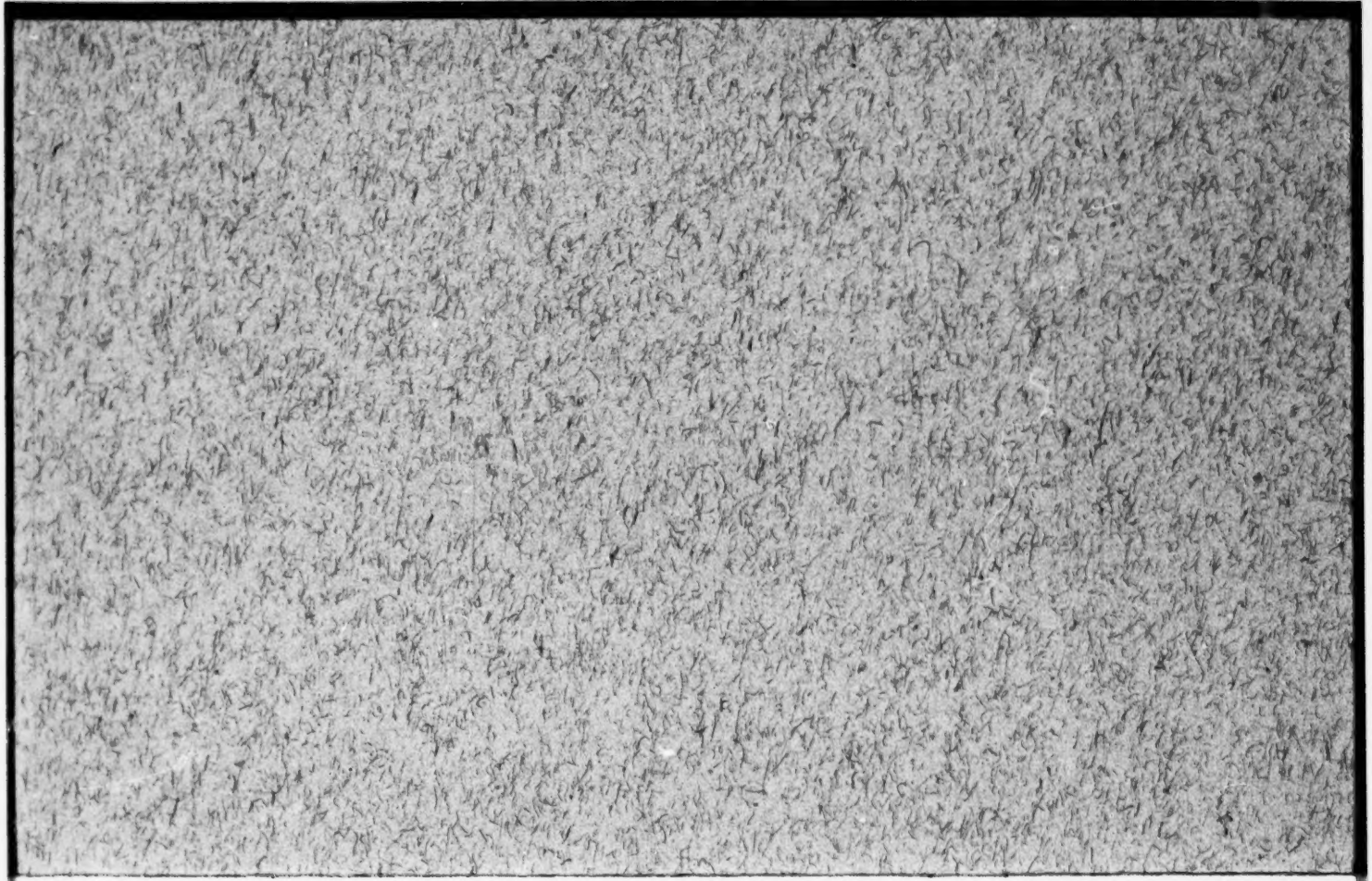

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-403

SAMUEL J. JORDON, *et al.*,

Petitioners,

v.

JOHN J. GILLIGAN, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners Samuel Jordon, et al., submit this supplemental brief with regard to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, No. 73-1977 (May 12, 1975).

The instant case involves a collateral attack on a final District Court order awarding counsel fees. Attorneys' fees were awarded by an order of May 19, 1972, which became final on that date, and from which no appeal was ever taken. Nine months after the entry of this order, Ohio moved to vacate it on the sole ground that the Eleventh Amendment deprived the District Court of jurisdiction to enter such an award against a state. Since this case presents such a collateral attack, rather than a direct appeal, the only ground on which that award of counsel fees may be challenged would be a lack of jurisdiction.

Both courts below properly recognized this limitation. Petition 8a-9a, 18a, 33a-34a. Even if the District Court's decision of May 19, 1972, were erroneous in light of *Alyeska,* such an error would be only an ordinary mistake of law not jurisdictional in nature and not raisable at this late date, three years after the entry of the order from which no appeal was taken.

Were this case a direct appeal from the May 19, 1972, order, the decision below still could not be upheld merely because of *Alyeska.* Counsel fees were awarded on May 19, 1972, not because of the private attorney general or any other rationale, but because the defendants did not oppose them. Petition 1a, 7a. Ten months later, after the defendants sought to collaterally attack the May 19 order, the District Court articulated three independent bases which would have supported an award of counsel fees had the original application for such fees been contested: (1) the "obvious constitutional infirmities" of the statute passed by the legislature and challenged by plaintiffs, a species of obdurate obstinacy, see *Brandenburger* v. *Thompson,* 494 F.2d 885, 890 (9th Cir. 1974), (2) the benefit conferred upon the defendants and the voters of Ohio, citing *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1960), and (3) the private attorney general doctrine. Petition 3a-7a. The sole issue raised on the subsequent appeal, and the sole basis on which the Sixth Circuit reversed the award of counsel fees, was whether the Eleventh Amendment bars awards of counsel fees against a state. That question was expressly left unresolved by this Court's decision in *Alyeska.* Slip opinion, pp. 25, 29, nn. 39, 44.

For the above reasons this Court's decision in *Alyeska Pipeline Service* v. *Wilderness Society,* does not provide an independent basis for affirming the decision of the Court

of Appeals. A Writ of Certiorari should therefore issue to review the judgment and opinion of the Sixth Circuit.

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